No.

Supreme Court of the United States.

OCTOBER TERM, 1900.

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No. 212.

CHARLES H. SUTTING, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

BRIEF FOR THE PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

The plaintiff in error was the defendant in an indictment returned into the Superior Court of the Commonwealth of Massachusetts within and for the county of Suffolk, under the act of the legislature of Massachusetts, entitled "*An act to amend and codify the statutes relating to insurance*," approved June 25, 1894, charging him with negotiating and transacting unlawful insurance with a foreign insurance company not admitted to do business in that State.

The indictment, found by the grand jury on March 11, 1899, was based upon *section 98* of the statute above mentioned, being chapter 522 of the Acts of 1894, which, by *section 1*, may be cited as the Massachusetts Insurance Act of 1894 (Massachusetts Acts and Resolves, 1894, p. 675).

Section 98 of this statute provides as follows:

"Any person who shall assume to act as an insurance agent or insurance broker without license therefor as herein provided, *or who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this Commonwealth*, or who as principal or agent shall violate any provision of this act in regard to the negotiation or effecting of contracts of insurance, shall be punished by fine of not less than one hundred nor more than five hundred dollars for each offence."

The indictment charged that the defendant, Charles H. Nutting, of Boston, on the 18th day of November, 1898, at Boston, "did act in the negotiation and transaction of unlawful insurance with a foreign insurance company not admitted to do business in said Commonwealth by then and there for one William McKie, of said Boston, negotiating with and procuring to be issued by divers certain individuals as insurers a certain contract and policy of insurance against loss upon a certain vessel of said McKie there situate, the said individuals then being associated, organized, and engaged as principals in the business of insurance under and by authority of the government of the United Kingdom of Great Britain and Ireland, and said individuals not being then and there admitted to do insurance business in said Commonwealth according to law, against the peace of said Commonwealth and contrary to the form of the statute in such cases made and provided" (Record, pp. 2, 3).

The defendant pleaded not guilty, and the case was tried by the court and jury upon an agreed statement of facts in writing, as follows:

1. Some time prior to the 18th day of November, 1898, Charles H. Nutting, of Boston, solicited from William McKie, a ship-builder in Boston, the business of procuring insurance upon a vessel then in process of construction by McKie in his ship yard in Boston.

2. Nutting, at said time, was a licensed insurance broker in Boston, and attorney and agent of Johnson & Higgins, average adjusters and insurance brokers, having an office in Boston, at 12 Central street, in charge of the defendant and another, and having a principal office in New York city, New York.

3. Some time after McKie was so solicited by the defendant for said business, as aforesaid, Nutting, acting as agent for said Johnson & Higgins, secured the authority of McKie to the placing of a contract of insurance for £4,124 upon said vessel.

4. Thereupon Nutting transmitted an order for said insurance to said Johnson & Higgins, of New York, and said Johnson & Higgins at once wrote to John D. Tyson and Company, of Liverpool, England, they being the Liverpool agents of said Johnson & Higgins, to procure insurance upon the said vessel of McKie for the amount of £4,124.

5. Thereupon John D. Tyson and Company, pursuant to said request to procure a policy of marine insurance, did procure a policy (a copy of which is annexed) to be issued

and delivered at Liverpool by the London Lloyds to John D. Tyson and Company in favor of said Johnson & Higgins, and "on account of whom it may concern, as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain;" John D. Tyson and Company, at the time of receiving said policy, advancing and paying the premiums thereon for account of Johnson & Higgins, John D. Tyson and Company receiving a commission upon said insurance from said Lloyds for and on account of themselves and of Johnson & Higgins.

6. At all the times mentioned, said London Lloyds were individual insurers, citizens of England, associated and engaged as principals in the business of insurance under and by authority of the government of the United Kingdom of Great Britain and Ireland, and carrying on said business in England upon the Lloyds' plan, whereby each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy.

7. John D. Tyson and Company, having received said policy from the London Lloyds, sent the policy to Johnson & Higgins of New York, and Johnson & Higgins in New York having made the endorsement which appears on the back of said policy at the request of McKie, sent the policy by mail to the defendant, who, thereupon, at Boston, on November 18, 1898, sent the same by mail to McKie; said London Lloyds not having complied with any of the requirements imposed by the laws of Massachusetts and not being admitted to do insurance business in this Commonwealth according to law.

8. The said policy was procured for McKie from the London Lloyds, as aforesaid, for compensation in the usual course of the business of Johnson & Higgins, and John D. Tyson and Company, and the defendant.

9. Charles H. Nutting and William McKie were at all the times mentioned in the indictment, and in this statement, citizens of the Commonwealth of Massachusetts.

10. Neither John D. Tyson and Company, nor Johnson & Higgins, nor Charles H. Nutting, were agents for said London Lloyds except so far as the facts stated constitute them such agents, and the term "broker," is not to be interpreted as meaning that they were such agents except so far as the facts herein stated constitute them such agents (Agreed Statement of Facts, *Ib.*, pp. 5, 6).

A copy of the policy of marine insurance effected at Lloyd's by John D. Tyson and Company of Liverpool, as above stated, is annexed, as Exhibit "D," to the agreed statement of facts (*Ib.*, pp. 8–13).

The policy is dated, London, the 18th of November, 1898, and is in the archaic form of "Lloyd's policy," which, Mr. Hopkins states, "is probably substantially the same as it was three centuries ago" (Hopkins, Manual of Marine Insurance, Phila. ed., 1867, p. 116). The policy is stamped and described as "printed at Lloyd's Royal Exchange," and "issued in the form printed and supplied by the Government previous to 1st August, 1887, except that the free of capture clause has been inserted." It contains the familiar clauses:

"And it is agreed by us the insurers that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard street, or in the Royal Exchange, or elsewhere in London."

"And so we the assurers are contented, and do hereby promise and bind ourselves each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured at and after the rate of ten shillings per cent."

The policy is separately signed by or on behalf of some fifty-eight persons, underwriting members of Lloyd's, who respectively subscribed for several different sums, amounting in all to 4,124 pounds sterling, agreeably to the custom and rule of Lloyd's, as stated by Mr. Hopkins, that "in signing, it is necessary that every underwriter should write his name separately, with the amount he undertakes, and the date of the subscription; and if the policy is signed by a substitute, the signature of the latter must be also inserted, and when one person undertakes for three or four names, he must still write each 'line' in full, not using the word 'ditto' in the repetitions" (Manual of Marine Insurance, p. 82).

The facts thus stipulated being all the evidence in the case, the defendant's counsel asked the Superior Court at the trial to make certain separate rulings (*infra*), but the court refused to make any of such rulings, and the defendant excepted to such refusals.

The court thereupon instructed the jury that upon the evidence set out in the agreed statement of facts, they would be warranted in finding the defendant guilty, to which the defendant also duly excepted.

The jury having returned a verdict of guilty, the defendant filed his exceptions to the rulings of the court, which were duly allowed, and were ordered to be transmitted to the Supreme Judicial Court of the Commonwealth. The indictment was then continued to await the decision of that court.

The rulings thus requested by the defendant at the trial and refused by the Superior Court, are as follows:

First. That on all the evidence in the case, the court should direct the jury to return a verdict of not guilty.

Second. That on all the evidence in the case, the jury would not be warranted in finding a verdict of guilty.

Third. That on all the evidence in the case, no unlawful act has been committed by the defendant.

Fourth. That the contract of insurance set forth in the evidence was made entirely outside the Commonwealth of Massachusetts.

Fifth. That the defendant cannot be held criminally liable for an act done without the State; and the last clause of section 3 of chapter 522 of the Acts of 1894 of the Commonwealth, providing that all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein, cannot make a contract entered into without the Commonwealth of Massachusetts an act done within the Commonwealth for the purposes of criminal liability, and is null and void in so far as it purports so to do.

Sixth. That so much of section 3 of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as provides that all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein, and as attempts to make a contract entered into without the Commonwealth of Massachusetts an act done within the Commonwealth, is contrary to the provisions of the Constitution of the United States, and is unconstitutional and void.

Seventh. That so much of section 87 of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the Constitution of the United States and is unconstitutional and void.

Eighth. That so much of section 98 of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the Constitution of the United States, and is unconstitutional and void.

Ninth. That the defendant acted merely as the agent of the assured in obtaining the contract of insurance set forth in this case.

Tenth. That the defendant in no way represented the London Lloyds (the insurers) in relation to the contract of insurance set forth in this case.

Eleventh. That so much of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the fourteenth amendment of the Constitution of the United States and is unconstitutional and void.

The Supreme Judicial Court of the State overruled the defendant's exceptions in an opinion delivered by Chief Justice Holmes (*Ib.*, pp. 18–20; Commonwealth *vs.* Nutting, 175 Mass., 154).

The Superior Court thereupon sentenced the plaintiff in error to pay a fine of four hundred dollars and ordered that he stand committed until this sentence be complied with (Record, p. 15).

The defendant sued out the present writ of error to that judgment, which was allowed by the Chief Justice of the Superior Court (*Ib.*, pp. 15–17).

ASSIGNMENT OF ERRORS.

I. The Superior Court below erred in refusing the requests of the plaintiff in error for rulings at the trial, and particularly the Fifth, Sixth, Seventh, Eighth, and Eleventh requests, and the Supreme Judicial Court of Massachusetts erred in overruling the exceptions to the refusals of the Superior Court to grant the said requests.

II. Upon all the evidence the acts charged in the indictment against the plaintiff in error were done without the jurisdiction of the Commonwealth of Massachusetts, and the conviction of the plaintiff in error was for that reason repugnant to the provisions of the Constitution of the United States, and particularly the Fourteenth Amendment thereof.

III. The courts below erred in not holding and deciding that the plaintiff in error cannot be held criminally liable for an act done without the State, and that the last clause of section 3 of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts, providing that all contracts of insurance on property, lives, or interests in the said Commonwealth shall be deemed to be made therein, cannot make a contract entered into without the Commonwealth of Massachusetts an act done within the said Commonwealth for the purposes of criminal liability, and is null and void in so far as it purports so to do.

IV. The courts below erred in not holding and deciding that so much of section 3 of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as provides that all contracts of insurance on property, lives, or interests in the Commonwealth shall be deemed to be made therein, and as purports and attempts to make a contract entered into without the said Commonwealth an act done within it, for the purposes of criminal liability, is, in its application to this case, repugnant to and in violation of the provisions of the Constitution of the United States, and particularly the Fourteenth Amendment thereof, and is null and void.

V. Upon all the evidence the acts of the plaintiff in error were such as he had the right to do and perform under and by virtue of the provisions of the Constitution of the United States, and particularly the Fourteenth Amendment thereof, and the conviction of the plaintiff in error therefor was for that reason repugnant to the provisions of that Constitution.

VI. The courts below erred in holding and deciding that the provisions of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts, and particularly sections 3, 87, 93, and 98 thereof, which were interpreted as intending to forbid the acts done by the plaintiff in error, and to make the same unlawful and criminal, were constitutional and valid as so interpreted, and were not as so interpreted repugnant to and in violation of the Constitution of the United States, and particularly the Fourteenth Amendment thereof.

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VII. The courts below erred in holding and deciding that the provisions of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts, and particularly sections 3, 87, 93, and 98 thereof, as interpreted and applied in this case, do not as so interpreted and applied deprive the plaintiff in error of his liberty and property, without due process of law, and do not as so interpreted and applied deny to the plaintiff in error the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

VIII. The courts below erred in holding and deciding that the provisions of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts, and particularly sections 3, 87, 93, and 98 thereof, as interpreted and applied in this case, do not as so interpreted and applied deprive the plaintiff in error of his liberty and freedom to contract, in violation of the Constitution of the United States.

IX. The courts below erred in rendering judgment herein in favor of the Commonwealth of Massachusetts and against the plaintiff in error.

ARGUMENT.

FIRST.

The case as presented by the provisions of the Massachusetts Insurance Act, the agreed facts, and the judgment of the Supreme Judicial Court overruling the exceptions.

1. *Section 3* of the Massachusetts Insurance Act of 1894 (containing one hundred and twelve sections) provides:

"A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the assured upon the destruction, loss or injury of something in which the other party has an interest, and it shall be *unlawful* for any company to make any contract of insurance *upon or concerning any property or interests or lives in this Commonwealth*, or *with any resident thereof*, or for any person as insurance agent or insurance broker to make, negotiate, solicit or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this act."

And at the end of this section it is declared:

"All contracts of insurance on property, lives or interests in this Commonwealth shall be *deemed to be made therein*."

By *section 1* it is provided that "when consistent with the context and not obviously used in a different sense the term 'company,' or 'insurance company,' as used herein, includes all corporations, associations, partnerships or individuals engaged as principals in the business of insurance; the word 'domestic' designates those companies incorporated or formed in this Commonwealth, and the word 'foreign,' when used without limitation, includes all those formed by authority of any other State or government."

Section 77 provides that "foreign insurance companies upon complying with the conditions herein set forth, applicable to such companies, may be admitted to transact in this Commonwealth by constituted agents resident therein any class of insurance authorized by the laws of the Commonwealth."

Sections 78, 79, and 80 prescribe the conditions of the admission of foreign insurance companies, and prohibit them from doing business in the State until the prescribed conditions are complied with.

Section 86 provides:

"Associations of individuals, *citizens of the United States*, whether organized within the Commonwealth or elsewhere within the United States, formed upon the plan known as Lloyds—whereby each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy—may be authorized to transact insurance other than life in this Commonwealth, in like manner and upon the same terms and conditions as are required of and imposed upon insurance companies of other of the United States."

Section 87 provides that "any person not a duly licensed insurance broker, who solicits insurance on behalf of any insurance company, or transmits for a person other than himself an application for or a policy of insurance to or from such company, or offers or assumes to act in the negotiation of such insurance, shall be deemed an insurance agent within the intent of this act, and shall thereby become liable to all the duties, requisitions, liabilities and penalties to which an agent of such company is subject."

Section 89 makes an insurance agent liable on all contracts effected by or through him directly or indirectly for or on behalf of any company not authorized to do business in the Commonwealth.

Section 90 provides that "an insurance agent or broker who acts for a person other than himself in negotiating a contract of insurance by an insurance company shall, for the purpose of receiving the premium therefor, be held to be the company's agent, whatever conditions or stipulations may be contained in the policy or contract."

And *section 98*, upon which the indictment in this case was based, provides that "any person who shall assume to act as an insurance agent or insurance broker without license therefor as herein provided, or who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this Commonwealth, or who as principal or agent shall violate any provision of this act in regard to the negotiation or effecting of contracts of insurance, shall be punished by fine," &c.

2. Mr. Nutting, as seen, was charged in the indictment, as based on this *98th* section, with acting on November 18, 1898, at the city of Boston, in the negotiation and transaction of unlawful insurance with a foreign insurance company not admitted to do business in the State, by then and there for one McKie of Boston negotiating with and procuring to be issued by divers individuals as insurers a certain policy of insurance against loss upon a vessel of McKie there situate, such individuals being engaged in the business of insurance under the authority of the United Kingdom of Great Britain and Ireland, and not admitted to do business in Massachusetts.

The highest court of the State, overruling all the exceptions, adjudged that the provisions of the several sections of

the act of 1894, under which the plaintiff in error was convicted of the offense charged in the indictment, were not, as interpreted and applied in this case, in conflict with the Constitution of the United States.

3. It appears by the agreed facts that the only acts or things in the present matter done by Mr. Nutting in the territory and jurisdiction of the State of Massachusetts, before he received by mail, in Boston, from his principals, in New York, the Lloyd's policy of insurance in question, effected in London by Tyson and Company of Liverpool, were (1) to solicit from William McKie, a citizen of the United States, and a ship-builder in Boston, the business of procuring insurance upon a vessel then being built by McKie in his Boston ship yard, (2) to secure, as agent for Johnson & Higgins of New York, McKie's authority to the placing of a contract of insurance upon his vessel, and (3) to transmit an order for such insurance to Johnson & Higgins, of New York.

The order for the insurance specified no particular insurance, but left Johnson & Higgins free to procure the insurance where they could.

Mr. Nutting did nothing more in the matter, and nothing else whatever in the territory and jurisdiction of the State, before and until he received by mail in Boston the policy of insurance in question from Johnson & Higgins in New York, when he simply mailed the policy to Mr. McKie in Boston.

When Johnson & Higgins in New York received from Mr. Nutting the order for the insurance, they requested Tyson and Company, of Liverpool, England, to procure in England a policy of marine insurance upon McKie's vessel for the

amount required. No insurers were named or suggested. The risk was offered by Tyson and Company to the London Lloyds. They accepted it, agreed with Tyson and Company as to the premiums, executed in London a time policy of marine insurance on McKie's vessel, and delivered the policy at Liverpool to Tyson and Company, who at the time of receiving the policy advanced and paid the premiums for account of Johnson & Higgins. The policy was effected by Tyson and Company in the name of "Johnson & Higgins, on account of whom it may concern, as well as in their own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all."

Tyson and Company having sent the policy from Liverpool to Johnson & Higgins in New York, Johnson & Higgins there endorsed the policy over to McKie and transmitted it by mail to Mr. Nutting, who mailed it at Boston to McKie, who was indebted to Johnson & Higgins for the amount of the premiums advanced, and presumably reimbursed them.

(a.) *The policy was subscribed by the underwriters in London on the 18th of November, 1898, was payable in England only, and was unquestionably a lawful and valid English contract, and not a Massachusetts contract.*

The authority of the Massachusetts case of *Commonwealth Mutual Fire Insurance Company vs. Knabe Manufacturing Company* (171 Mass., 265), is satisfactory and sufficient on that point. (See *infra.*)

The policy as above stated, is in the form in use at Lloyd's in London (being commonly called the "Lloyd's policy"),

which was a form, as Mr. Arnould, in his great work on Insurance, states, "introduced into England, probably about 1450 A. D., when the practice of marine insurance was being assumed into the hands of English merchants under a powerful feeling of jealous rivalry and opposition to the Lombard traders, who had long settled in London about the street still known by their name, and had secured for themselves a monopoly of the business of insurance and exchange. The form of this instrument, to any one not accustomed to use it, may well seem complex and cumbersome; yet long use, and a variety of decisions have now given such a degree of certainty, and the sanction of the legislature a second time bestowed upon it seems to impart to it such authority, that it is likely now to be retained among the chief instruments of English commerce" (1 Arnould, Marine Insurance, 6th ed., by Machlachlan, 231).

With respect to the first clause in the printed form of Lloyd's policy, containing the names of the assured or their agents, Mr. Lowndes states: "These words imply that some name must be inserted (this is necessary by *Stat. 28 Geo. 3, c. 56; 30 Vict., c. 23*); that it matters not whether it be the name of the principal or of his agent or broker; that the specific nature of the assured's interest in the thing insured need not be described; and that the policy may enure to the benefit of a future transferee of the interest. And each of these propositions has been in one way or another established by law (*Arnould, Ins., 234, 235; McKenzie vs. Whitworth, L. R., 10 Exch., 142; 1 Exch. D., 36*). An assignee of a policy may in certain cases sue in his own name on the policy. Stat. 31 & 32 Vict., c. 86, § 1; 36 & 37 Vict., c. 66, § 25, 26." (Lowndes, Marine Insurance, 47.)

It is, indeed, not denied, as we understand, by the learned and accomplished Chief Justice of the Supreme Judicial Court of Massachusetts, who delivered the opinion of the court in this case, that the agreed facts adduced by the Commonwealth to sustain the present indictment disclosed and established that the policy of insurance upon which the prosecution was based was an English and not a Massachusetts contract.

(*b.*) *It is equally certain that Mr. Nutting was not an agent for any purpose or object whatever of the British underwriters who accepted the risk and subscribed the policy, and that neither Johnson & Higgins nor Tyson and Company were agents of those underwriters.*

"Lloyd's underwriters," says Arnould, "now meet and carry on their business in subscription rooms over the Royal Exchange, consisting of two apartments, one in which the underwriters sit for the transaction of business with their employers, called the Public Room, and another called the Private Room, opening out of the first. The affairs of the subscribers to these rooms are managed by a committee called Lloyd's committee and presided over by a chairman. Lloyd's underwriters individually sign their names at the foot of the policy and opposite thereto the sum insured by each in figures, and also in words, with the date of so doing. This is technically called underwriting the policy for so much, and each thereby makes a separate contract in the terms of the instrument with the assured of the particular amount set opposite his name. The right of action is consequently against each separately and not against all jointly" (1 Arnould, Marine Insurance, 6th ed., 149, 150).

As Mr. Arnould states, "there may be agents to effect policies for the assured, and agents to subscribe them for the underwriters. *Lloyd's agents* have no other authority

than what they derive from the printed instructions under which they act" (1 Arnould, Marine Insurance, 190, 192).

(c.) *The receipt by Tyson and Company at the time of paying the premiums of a commission upon the insurance from the underwriters at Lloyd's for themselves and Johnson & Higgins, has no tendency to show that they were agents of the English underwriters.*

It is the invariable custom in England, as we may observe, for marine underwriters to allow a brokerage or commission of 5 per cent. on all insurances *even where they are effected by the assured himself without the intervention of a broker.* The writers on the law and practice of marine insurance state that this is and has been from time immemorial the custom of marine underwriters in England. (See 1 Arnould, Marine Insurance, 195; Hopkins, Manual of Marine Insurance, 210, 262, 346.) "From the premiums nominally agreed to be paid to the underwriter," Mr. Hopkins states, "two deductions are made before the money comes into his hands. One is a brokerage of 5 per cent. due to the agent effecting the insurance, but which it is to be remarked is paid equally, although the assured does his insurance personally, without that intervention. The other deduction is a discount, usually of 10 per cent. for immediate payment. It is also paid to whoever effects the insurance. An inconvenience attends this system of deduction. It is that the quoted premium must always be 15 per cent. above the rate equivalent to any risk, including underwriter's profit" (Hopkins, Manual of Marine Insurance, p. 210). This authority further explains the system: "Sup-

posing the transaction to be 'for cash'—which means, practically, a payment shortly after the completion of the policy, but not at the moment of effecting it—the assured gives his check to the underwriter, yet not for the full amount; the agreed premium being subject to two conditions—brokerage and discount. This brokerage represents the agent's emolument for effecting the insurance, and comes, or is *supposed* to come, out of the underwriter's pocket, but now it is allowed indifferently to broker or principal in doing an insurance, and is looked upon as a regular and constant deduction from the nominal premium paid. And this induced the expression that brokerage was '*supposed*' to be at underwriter's cost; for the underwriter in fixing the value of a risk, and forming his premium accordingly, has regard to the customary deductions and arranges such a *net* price as he considers equivalent to the risk." The nominal premium is thus 15 per cent. above the mathematical value of the risk.

The circumstance, therefore, that the Liverpool agents of Johnson & Higgins, Tyson and Company, received from the English underwriters a commission for themselves and Johnson & Higgins, has no bearing whatever upon any question as to whose agents they were, or as to whose agent Mr. Nutting, the plaintiff in error, was. It never was supposed in England that a broker to effect an insurance was constituted the agent of the underwriters by the custom under which he is allowed by them a commission on the insurance, which after all is only nominally paid by the insurers, and is really paid by the assured himself.

Upon general principles, it is clear, as decided by the court of appeals of New York, that "the fact that insurance

brokers receive *commissions* from the companies for such risks as they procure, does not constitute them agents for the companies" (Devens *vs.* Insurance Co., 83 N. Y., 171; Northrup *vs.* Peza, 60 N. Y. Supplement, 363). And as was also said by that learned court, "a mere insurance broker cannot be converted into an agent of the *insurance company* without evidence of some action on the part of the company, or of facts from which a general authority to represent it might be inferred" (Allen *vs.* Insurance Co., 123 N. Y., 6).

4. As it was undeniable under the evidence in this case that the alleged "unlawful" insurance on Mr. McKie's vessel was effected by a lawful and valid contract made on November 18, 1898, in London, and that the contract was an English and not a Massachusetts contract, the indictment was sought to be supported, on the part of the Commonwealth, by adducing the mandatory declaration at the end of *section 3* of the act of 1894 that "all contracts of insurance on *property in this Commonwealth* shall be *deemed to be made therein*," under which it was maintained by the prosecution that for the purposes of this criminal action, the court and jury were bound to deem and treat the contract of insurance referred to, contrary to the truth of the fact, and by a fiction of law, as a contract entered into not in *London*, but in *Boston*, and therefore within the territorial jurisdiction of Massachusetts.

This position was of course met by the objection, on the part of the defendant, that the mandatory and arbitrary declaration in *section 3* of the act of 1894, which attempts to make a contract entered into without the State of Massachusetts an act done within it, is in conflict with the Con-

stitution of the United States, and void, and the Superior Court at the close of the evidence was asked, by the defendant's request for rulings, to so adjudge (Defendant's Request for Rulings, *Fourth, Fifth, Sixth, supra;* Record, p. 7).

The court decided that the contention of the defendant in these requested rulings in respect to the mandatory provision at the end of the *third section* of the act of 1894, was entirely without merit, and accordingly refused to make the rulings.

The plaintiff in error also asked the Superior Court, at the close of the evidence, to make the following rulings:

"Seventh. That so much of *section 87* of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the Constitution of the United States, and is unconstitutional and void.

"Eighth. That so much of *section 98* of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the Constitution of the United States, and is unconstitutional and void.

"Eleventh. That so much of *chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts* as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the fourteenth amendment of the Constitution of the United States, and is unconstitutional and void" (Defendant's Request for Rulings, Record, p. 7).

The Superior Court declined also to make these rulings, or any of them, and also refused to direct the jury to return a verdict of not guilty, or to decide that on all the evidence the jury would not be warranted in finding a verdict of guilty, or to decide that on all the evidence no unlawful acts

had been committed by the defendant, and the court finally charged the jury that they would be warranted in finding the defendant guilty (Defendant's Request for Rulings, Record, p. 6).

5. The Supreme Judicial Court of Massachusetts by its judgment overruling Mr. Nutting's exceptions, determined that the agreed facts sustained the indictment, and he was properly convicted, and that the provisions of those sections of the insurance act of 1894 under which the conviction was had, and the validity of which was drawn in question at the trial, were in conformity and not in conflict with the Constitution of the United States.

The opinion of the learned court would seem to indicate that this conclusion was reached not entirely without some misgivings as to the strength and firmness of the grounds upon which it rested, in view especially of what are spoken of in the opinion as the "intimations" of this court in the leading case of *Allgeyer vs. Louisiana*, to which the court expressed its willingness, however, to bow without criticism. The learned court thought that notwithstanding the right of Mr. McKie, if he chose, to apply from Boston to the London Lloyds for insurance, and while the legislature of the State could not impair his freedom to elect with whom he would contract, it might prohibit not only agents of the insurers, but also brokers, from soliciting or "*intermeddling*" in such insurance, and that what it said in its opinion went very little, if any, further than what is laid down in similar terms, as the court thought, in *Hooper vs. California* (155 U. S., 648), the authority of which is recognized in the subsequent Louisiana case.

The learned court, as we think, did not perceive that upon the facts of the transaction in the *Hooper* case, the defendant, while an agent of the assured, was an agent also of the New York Insurance Company to deliver the policy upon the assured's acceptance of it, and to receive from him the premium within the State of California, where the policy became for the first time a completed contract between the parties. The business of insurance in the case was in fact done within the borders of California by a foreign corporation not authorized to do anything in the State, in violation of the statute of the State. But in the present case no business whatever was done or intended to be done, and no contract was made or intended to be made, by the British individual underwriters, within the borders of the State of Massachusetts, and the object of the legislation of that State was to prohibit and prevent the underwriters at *Lloyd's* from contracting or doing business with the people of the State *at the London domicile of the British underwriters*, even to the extent of declaring that all contracts of insurance wherever made on property in the Commonwealth "shall be deemed to be made therein." That object was and is an unconstitutional one, which cannot be carried into effect by the penal instrumentalities intended to be employed for that purpose in the legislation under consideration as interpreted by the court below.

The learned court, in its opinion, finally said:

"What the legislature can do it has done by Statute 1894, c. 522. By *section 3:* 'It shall be unlawful * * * for any person as insurance agent or insurance broker, to make, negotiate, solicit, or in any manner aid in the transaction of insurance upon any property or interests in this Commonwealth, or with any resident thereof, except as authorized

by the act.' By *section 98:* 'Any person who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign company not admitted to do business in this Commonwealth, or who as principal or agent shall violate any provision of this act in regard to negotiating or effecting contracts of insurance,' is subject to a penalty. Whether the description of the insurance in the indictment as unlawful be rejected as surplusage, or whether the insurance be held to be unlawful within the meaning of the act, and because transacted through a broker acting unlawfully, an offense under the statute is set forth, and the defendant properly was convicted. It is unnecessary to consider whether the same result could be reached in another way. Possibly, for the reasons given above, it would be within the power of the legislature to enact that the insurance broker should be *regarded as the agent of the insurers*, whatever the agreement of the parties, and in that way reach the result that any contract made through him when he and the insured were here would be made in this State, and thus would be subject to our laws. Possibly it might be argued that such was the effect of our statute, although, if so, it fails to state it as clearly as could be wished. See sections 3 end, 87, 90. Exceptions overruled."

It would clearly seem that so long as the legislative power of a State is controlled by the Fourteenth Amendment of the Federal Constitution, a penal statute like this cannot finally be sustained as a valid law by the courts. It is repugnant to the American constitutional guaranties of liberty and property.

SECOND.

The scheme of the Massachusetts insurance act of 1894, so far as involved in this case, is in direct conflict with the Constitution of the United States, and particularly its Fourteenth Amendment, in that the object of the legislature was not merely to prevent the underwriters at Lloyd's from contracting or doing business within the territorial jurisdiction of Massachusetts, but to prevent the making of contracts of insurance between them and the citizens and people of the Commonwealth at the domicile of the English underwriters at the Royal Exchange in London.

1. The act, so far as we are concerned with it in this case, proceeds upon the distinctly erroneous theory that a State of this Union has the right and power under the Constitution of the United States to proscribe, prohibit and prevent by criminal enactments and penalties all contracts for the insurance of property in the State by foreign corporations or natural persons not admitted under the act to do insurance business in the State, whether such contracts are effected within or are made and to be performed without the territorial jurisdiction of the Commonwealth. Since the great judgment delivered for this court by Mr. Justice Peckham in the leading case of *Allgeyer vs. Louisiana* (165 U. S., 578), decided in 1896, it has been regarded as the settled law of the land that it is the absolute constitutional right of a citizen or resident of a State to enter into contracts made outside of the State with foreign underwriters not admitted to do business in the State for the insurance of his property in the territory of the State, and to effectuate such contracts by acts done within the limits of the State, any prohibition of a State

statute to the contrary notwithstanding. The court in that case unanimously said:

"In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction; nor can the State legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the State. The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside of its limits, while he himself remains within it (*Milliken vs. Pratt*, 125 Mass., 374; *Tilden vs. Blair*, 21 Wall., 241). The contract in this case was thus made. It was a valid contract made outside of the State, to be performed outside of the State, although the subject was property temporarily within the State."

And the learned court added:

"The Atlantic Mutual Insurance Company of New York has done no business of insurance within the State of Louisiana, and has not subjected itself to any provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens, even if that property were in the State of Louisiana, and correlatively the citizens of Louisiana had the right without the State of entering into contracts with an insurance company for the same purpose. *Any act of the State legislature which should prevent the entering into such a contract*, or the mailing within the State of such a notification as is mentioned in this case, is an improper interference with the *conduct* of its citizen, although

residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the State."

The court observed:

"We are not alluding to *acts done within the State by an insurance company or its agents doing business therein which are in violation of the State statutes. Such acts come within the principle of the Hooper case, and would be controlled by it.* When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside of the State, and as such was a valid and proper contract. The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the State legislature had no right to prevent, at least, with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not *due process of law*, because it prohibits an act which under the Federal Constitution the defendants had a right to perform."

It was thus adjudged that the Louisiana statute under which Mr. Allgeyer had been convicted of a crime against the State was a violation of the Federal Constitution, and no justification for the judgment against him.

2. As we have seen, by *section 3* of the Massachusetts Insurance Act, it is declared to be "unlawful" for any insurance company, unless and except as authorized under the provisions of the act, to make any contract of insurance (1) "*upon or concerning any property or interests or lives in the Commonwealth*," or (2) "*with any resident thereof*," and it is further declared that "all contracts of insurance on prop-

erty, lives or interests *in this Commonwealth* shall be *deemed to be made therein*," wherever as matter of fact and law such contracts are actually made and actually to be performed.

The prohibition of the act purports to apply as well to *exterritorial* contracts by citizens of the State with foreign insurance companies not authorized to do business in the State, as to the *infraterritorial* contracts by citizens of the State with such companies, and "any person" acting as "principal" or "agent," in the negotiation or transaction of such contracts of insurance, whether he so acts *without* or *within* the territorial jurisdiction of the Commonwealth, is subject to the penalties of the statute. This court, however, pointed out with great clearness in *Allgeyer vs. Louisiana*, as well as in *Hooper vs. California*, the constitutional distinction in respect to the rights of citizens of a State between contracts of insurance with such companies made *within* and those made *without* the territorial jurisdiction of the State, and the disregard of that distinction and the consequences of it by the legislature of Massachusetts necessarily affected its enactment with the vice of inherent *unconstitutionality*.

3. The enactment, it may be observed, is peculiarly repugnant to the Constitution of the United States, in its application to the facts of this case, in view of the provision in the 86 88th section of the statute, by which only individual underwriters *who are citizens of the United States* may be authorized to transact marine insurance business in the State upon Lloyd's plan, under the conditions imposed upon "insurance companies of other of the United States."

The individual underwriters at Lloyd's do no business in

Massachusetts, and have not entered the State through their representatives or agents to do business there.

The Massachusetts statute proscribes and puts under its ban the greatest body of marine insurers of the greatest commercial country of the world, whose history antedates the sailing of the *Mayflower*, and in the same breath in which it denies to them the privilege upon any conditions of doing business, as underwriters, in the State, the act purports to deprive the ship-owners and merchants of the Commonwealth of their natural and common law and constitutional right to insure their vessels and merchandise at Lloyd's, by contracts made and to be performed at the Royal Exchange in London, and to punish them, as well as their agents and attorneys, in and out of the State, if they do so, or attempt to do so.

The citizens and people of the Commonwealth and their just constitutional rights and interests are between the upper and nether stones of this legislation, which is manifestly based upon a principle of paternalism in government far beyond the reach and support of any police or other legislative power of the State under the Constitution of the United States.

It seems to be clear under the provisions of the act that if Mr. McKie, the assured in this case, had gone to New York and employed Johnson & Higgins to secure insurance on his property at Lloyd's in London, Johnson & Higgins could have been indicted under the statute and punished if they had been found in Massachusetts. As if to remove doubt upon the subject, *section 3* declares that all contracts of insurance on property, lives or interests in the Commonwealth, *shall be deemed to be made therein.*

*

4. Since the Fourteenth Amendment a citizen of a State is a citizen of the United States residing in the State, and in one view of the effect of the great Amendment the rights, privileges and immunities which belong to him, as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of the State; but however that may be it is clear that the State of Massachusetts cannot, *directly or indirectly, by penal legislation, deprive the citizens of the United States residing in her territory of the right and privilege of contracting in London with the natural persons who underwrite marine policies at Lloyd's for the insurance of their maritime or other commercial property in the State, or of any essential or necessary and proper incident thereof,* any more than she may prohibit and prevent them from buying lands or ships or merchandise in Great Britain under the sanction of its laws.

5. The California statute involved in the case of *Hooper vs. California* (155 U. S., 648), as we have said, is a very different statute. It provides only for the punishment of "every person who *in this State procures* or agrees *to procure* any insurance for a resident of the State, from any insurance company not incorporated under the laws of the State, unless such company or its agent has filed the bond required by the laws of this State relative to insurance." The California statute does not purport to prohibit the citizens of the State from making contracts with unadmitted foreign underwriters outside of the State, for the insurance of their property in the State. Such contracts are not prohibited or attempted to be by the law of California. The statute in that respect is conformable to the Constitution of the United

States. The procuring of the contract is not forbidden, except when done within the territory and jurisdiction of the State. The statute of Massachusetts, however, purports to operate on the contracts themselves effected and consummated outside of the jurisdiction of the State, and is thus in contravention of the Constitution of the United States.

The contract of insurance in this *Hooper* case was procured by the defendant within the State, and was *consummated* and became binding for the first time as a completed contract within the territory and jurisdiction of California. The policy was procured by Hooper, it was accepted by and delivered to the assured, and the premium was paid to Hooper by the assured, all within the territorial jurisdiction of California. The foreign company was in fact doing business through an agent in the State in violation of its laws, as understood by this court when it said in the *Allgeyer* case (*supra*), "we are not alluding to acts done within the State by an insurance company or its agents doing business therein which are in violation of the State statutes. *Such contracts come within the principle of the Hooper case and would be controlled by it.*" Evidently, the *Hooper* case is no authority for the judgment pronounced in this case by the Supreme Judicial Court of Massachusetts, and the law of the case was, as we think, misapprehended by that learned court.

7. The case of *Pierce vs. The People* (106 Ill., 1), cited in the opinion below, likewise affords no support for the judgment in this case. The Illinois insurance act of 1869 provided a penalty against the agent of a foreign insurance company for acting for it without a certificate of authority from the auditor, showing a compliance with the conditions required by

the law for its doing business, and made a person aiding in the transaction of the insurance business of such company in the State subject to the penalty. Pierce was prosecuted for acting as the agent of a foreign company, without authority of law, by procuring and delivering a policy of the company in Illinois to a resident of the State, who paid Pierce the premium, part of which he retained as his commission, the balance being remitted to the home office. The defense as set up, that the policy stipulated that Pierce should be "deemed" the agent of the assured, and not of the company, was disregarded as a subterfuge by the court, which found that the facts showed conclusively that he acted in the interest and as the agent of the insurance company in the transaction in the State in violation of the law. The opinion in the case is taken up almost entirely with combatting the proposition that the defendant was not the agent of the assured, the character attempted to be given him by the company. He was, in fact, the agent of the company, notwithstanding the pretense to the contrary, and the contract was in fact effected through him, in Illinois, where, as stated, the premium was paid on the delivery of the policy to the assured. The act of the contracting agent of the company which was punished was that done in Illinois, and although the intention of the statute was to prevent any contract being made with an unauthorized insurance company by citizens of the State anywhere, its preventive measures were confined to contracts made within the limits of the State, and did not purport to extend to contracts made out of its jurisdiction.

8. The case of *Lamb vs. Bowser* (7 Bissell, 315) was an action on a premium note given to an Illinois insurance company upon an application to the agent of the company in Indiana for insurance on property in that State. The agent forwarded the application and the note to the company in Illinois, and caused a policy of insurance to be delivered to the defendant in Indiana; all of which was done by the company and the agent without having complied with the statute of Indiana respecting foreign corporations and their agents doing business in that State. The defense to the premium note was that the contract was unlawful under the Indiana statute providing penalties against any person who should make or cause to be made any contract or transact any business on account of a foreign corporation which had not complied with the State law. It was decided (1) that the contract was made in Illinois and was an Illinois contract, and therefore not in violation of the Indiana statute; (2) that the contract, being valid in Illinois, was good in Indiana, and everywhere, and might be enforced in Indiana. And the court said: "It is not competent for the legislature of Indiana to declare that the citizens of this State shall not be allowed to make such contracts as they please *out of the State* for the insurance of their property within or without the State." The Massachusets act is based upon the opposite and unconstitutional theory that a State *may* prohibit its citizens from insuring their property by contracts made out of the State.

THIRD.

The primary proposition of the argument on the part of the plaintiff in error is that Tyson and Company, Johnson & Higgins, and Mr. Nutting, the plaintiff in error, were not and cannot be deemed to have been the agents for any purpose or object of the underwriters at Lloyd's who subscribed the policy on Mr. McKie's vessel, and that the contract contained in the policy was wholly an English and not in any part a Massachusetts contract.

1. It is one of the agreed facts that "neither Tyson & Company nor Johnson & Higgins, nor Charles H. Nutting were agents for the London Lloyds, and the term 'broker' is not to be interpreted as meaning that they were such agents, except so far as the facts herein stated constitute them such agents;" but this stipulation was unnecessary, as it cannot be said, and, indeed, it is not suggested in the opinion of the Supreme Judicial Court of Massachusetts, that upon the facts stated Mr. Nutting or the other persons named can be regarded as the agent or the agents of the British underwriters who subscribed Mr. McKie's policy.

The learned court below did suggest that possibly the legislature might have power to enact a *fiction*, and possibly it had done so, by which "the insurance broker should be *regarded* as the agent of the *insurers*, whatever the agreement of the parties, and in that way reach the *result* that any contract made through him when he and the insured were here would be made *in this State and thus subject to our laws.*" But we are not now dealing with the question of the power of the legislature to resort to a fiction of that kind as a means of preventing by criminal punishment the citizens

of the State from getting their marine insurance, if they want to, in a foreign country, instead of in Massachusetts, although we may say here that we deny the power of a State legislature by enacting such a fiction, as suggested, to subject any one to its penal laws in respect to a lawful contract of insurance made in England by the London Lloyds in favor of a citizen of the State. Such legislation would only be an attempted exercise of that kind of purely arbitrary power by the State which it was the very object of the Fourteenth Amendment to eliminate from our system of constitutional government.

2. There can be no question that Tyson and Company of Liverpool, who procured the insurance in England, were agents of McKie, and were not agents for any purpose of the British underwriters. They were requested to get insurance in England for McKie by Johnson & Higgins of New York, under their employment by McKie to procure the desired insurance where they deemed best, and that employment was obtained for Johnson & Higgins by Mr. Nutting, the plaintiff in error, as their agent in Boston. All the persons named were the agents of Mr. McKie. They cannot be regarded as agents of the British underwriters.

The circumstance that Tyson and Company received a commission from the Lloyds, and shared it with Johnson & Higgins, does not affect the question, as already shown, as to whose agents they were or whose agent Mr. Nutting was. It is nothing uncommon for the owner of property to employ an agent to sell it for a certain price, telling him at the same time that he must get his *commission* out of the purchaser.

That does not make him agent for anybody except the seller. Here it was left to Tyson and Company to select the British underwriters with whom the insurance should be placed, and the London Lloyds paid the *commission* practically *for getting the preference*. By accepting part of it, Johnson & Higgins did not become the *agents* of the underwriters who allowed it, and whom they never saw. It is quite usual, too, for insurers, where the assured applies for the insurance in person, to allow the customary commission to the assured. If McKie had made personal application for the policy and the London Lloyds had deducted 5 per cent. from the premium, as charged, as a commission, we suppose that fact would not have made him *their* agent.

3. The policy became a completed and executed contract in England between the British underwriters and the assured the moment it was received by Tyson and Company and the premiums were paid by them in Liverpool. The contract was thus consummated and completed long before the *policy* was handed over to McKie in Boston. If the property had been lost by fire the day after the policy was received by Tyson and Company, McKie could have recovered in England upon the contract though it had never left Liverpool. When the policy was transmitted, through Johnson & Higgins, and Mr. Nutting, to McKie in Boston, it was so transmitted only as the paper evidence of a contract long since consummated and completed in England, and for the purpose of safe keeping by its owner. The contract was wholly an English contract. If McKie afterwards in Massachusetts repaid the advance of the premium by Tyson and Company, it had nothing to do with the *place where the contract was made.*

The case is precisely the same as though *McKie* had been present and did the acts himself in Liverpool. He was, indeed, constructively there in the person of Tyson and Company, his agents, under a familiar principle of law (Bailey *vs.* Hope Insurance Co., 56 Maine, 474; Milliken *vs.* Pratt, 125 Mass., 374; McIntyre *vs.* Parks, 3 Metcalf, 207). When the policy was received and the premiums were paid by the English agents, the acts had the same effect as they would have had if McKie himself, instead of Tyson and Company, had personally performed them in Liverpool, and had afterwards put the policy in his pocket and brought it to Boston on the next steamer.

The Supreme Judicial Court of Massachusetts, in *Milliken vs. Pratt* (125 Mass., 374, 376), said:

"If the contract is completed in another State, it makes no difference in principle whether the citizen of this State goes in person, or sends an agent, or writes a letter, across the boundary line between the two States. As was said by Lord Lyndhurst: 'If I, residing in England, send my agent down to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them' (*Pattison vs. Mills*, 1 Dow & Cl., pp. 342, 363). So, if a person residing in this State sends and transmits, either by a messenger or through the post-office, to a person in another State, a written contract, which requires no special forms or solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to and acted on by him there, the contract is made there, just as if the writer personally took the executed contract into the other State, or wrote or signed it there; and it is no objection to the maintenance of an action thereon here, that such a contract is prohibited by the law of this Commonwealth."

4. As further authority for what has been said it is unnecessary to go beyond the well-considered Massachusetts case of *Commonwealth Mutual Fire Insurance Company vs. William*

Knabe and Company Manufacturing Company (171 Mass., 265), decided in 1898 (of course after *Allgeyer vs. Louisiana*, decided in 1896). In that case, the plaintiff, a Massachusetts mutual company, sought to recover from the defendant, a manufacturing company of Maryland, certain assessments as a policyholder in the plaintiff corporation. The Massachusetts company was not permitted by the laws of Maryland to do business in that State, but it had nevertheless insured the property of the defendant in Baltimore by certain policies which the plaintiff claimed were *Massachusetts contracts*, made through certain *insurance brokers* in New York, who the plaintiff said were the agents of the defendant, or were not the agents of the plaintiff. It was admitted that if the policies were *Maryland contracts*, the assessments could not be recovered from the Maryland defendant corporation. The Supreme Judicial Court of Massachusetts, in a very concise and luminous opinion by Mr. Justice Morton, held that the insurance brokers through whom the policies were effected were the agents only of the defendant, and that the contracts contained in the policies were complete the moment the policies were put in the mail at Boston for transmission to the New York insurance brokers who had sent the applications for the insurance to the plaintiff.

It appeared that the defendant had requested Glover and Company, insurance brokers of New York, to get insurance for it on its Maryland property, and Glover and Company had requested Tate and Cornwall, other insurance brokers in New York, to obtain such insurance in the Massachusetts Company. Tate and Cornwall sent an application for the desired insurance to Blake and Taylor, who were the managers of the company in Boston. The policies were mailed

by the company to Tate and Cornwall, in New York, and they delivered them to Glover and Company, who mailed them to the defendant at Baltimore. Tate and Company, the New York brokers, were paid by Blake and Taylor a part of the commission allowed them by the insurance company, which, of course, in effect, was paid by the company itself to the New York insurance brokers. Nevertheless, it was held that the New York insurance brokers were not to be deemed the agents in any sense of the insurance company.

MORTON, *J.*, said:

"There is nothing to show that Tate and Cornwall were the authorized agents of the plaintiff. They are described as insurance brokers. They were requested by Glover and Company to obtain insurance on the property described in the policies. Glover and Company also requested them to obtain the insurance in the plaintiff company. In forwarding the application, they clearly acted for Glover and Company, who in turn acted for the defendant. They did not solicit the insurance for the plaintiff from Glover and Company, but Glover and Company requested them to procure insurance in the plaintiff company for the defendant. It seems to us plain that Tate and Cornwall must be regarded *as the agents of the defendant*. The fact that there were open accounts between Tate and Cornwall and Blake and Company (the managers of the plaintiff company), and that the premiums were charged to the former, who were paid by the latter out of the commissions which they were allowed by the plaintiff, has no tendency to show that they were its agents, nor has the fact that the checks received by Tate and Cornwall from Glover and Company, and sent by them to Blake and Company, were payable to the plaintiff's order, any such tendency. The plaintiff is a Massachusetts company. The offers contained in the applications were received and accepted by it in Boston. The policies were made and signed there. The contracts contained in the policies were to be performed there. When the policies were

mailed at Boston to the defendant's agents at New York, if not before, the contracts were complete, and must be regarded, we think, as Massachusetts contracts (Brauer *vs.* Shaw, 168 Mass., 198; Seamans *vs.* Knapp-Stout Co., 89 Wis., 171; Western *vs.* Genesee Insurance Co., 2 Kernan, 258; Bailey *vs.* Hope Insurance Co., 56 Maine, 474; Hartford Insurance Co. *vs.* Lasher Stocking Co., 66 Vt., 439)."

By the law of Massachusetts, therefore, the persons who acted under McKie's employment cannot be regarded as agents of the British underwriters, and the contract, which is the basis of this criminal prosecution against Mr. Nutting, was an English, and not a Massachusetts, contract, and the whole business of insurance involved was transacted by the British underwriters within British jurisdiction, and not within the State of Massachusetts.

The Pennsylvania case of *Western Massachusetts Mutual Fire Ins. Co. vs. Storage Co.* (6 Pa. Superior Court, 288), also decided in 1898, was a suit by the receiver of the corporation plaintiff in the Massachusetts case, above cited, to recover assessments levied for losses during the life of certain policies of the company on property in Pennsylvania issued and delivered in Massachusetts, and in which the defense was that the transaction was in violation of the law of Pennsylvania. The Pennsylvania court likewise held that the policies in that case were Massachusetts contracts, without knowledge, perhaps, of the prior Massachusetts decision, and that the prohibitive legislation of Pennsylvania could not apply to "companies who have never come within the boundaries of the Commonwealth, *who have neither office nor agent here and who have but issued and delivered policies in another State in a particular instance to a citizen of Pennsylvania.*"

PORTER, *J.*, said:

"The issuance and delivery of the policies in Massachusetts made the contract a Massachusetts contract to be governed by the law of Massachusetts, *free from taint of illegality by reason of the existence of penal or prohibitive legislation in Pennsylvania.* To hold otherwise would be to give to these acts *extraterritorial* effect, and to deprive the citizen of his constitutional right to make such contracts as he may desire beyond the boundaries of Pennsylvania (*Allgeyer vs. Louisiana*, 165 U. S., 578)."

5. The contract in the policy in this case is an English contract under the decision of this court in *Society vs. Clements* (140 U. S., 226–232), and under the general pertinent authorities (May on Ins., § 66; N. W. M. L. Ins. Co. *vs.* Elliott, 5 Fed. R., 225; Providence S. L. A. *vs.* Hadley, 102 Fed. R., 856; State *vs.* Williams, 46 L. A., 922; Hyde *vs.* Goodnow, 3 Comst. (N. Y.), 266).

The place of performance will ordinarily be deemed the place of contract unless the parties intended otherwise (London Assurance *vs.* Companhia de Moagens, 167 U. S., 149, 160, 161; Coghlan *vs.* S. C. R. R. Co., 142 U. S., 101; Hall *vs.* Cordell, 142 U. S., 116; Dicey, Confl. Laws, 568, 570; Story, Confl. Laws, § 280).

6. The contract was to be performed in England, and the negotiation and procurement of it, from inception to completion, from *alpha* to *omega*, took place not at Boston, but at London and Liverpool, and it was all between the London Lloyds of the one part, and McKie of the other part, acting through his agents, Tyson and Company.

FOURTH.

The object of the Fourteenth Amendment of the Constitution of the United States is to protect the citizens of the United States and the people of the States against all such arbitrary State legislation, under the guise of the police power, as that enforced against the plaintiff in error in this case.

1. The great purpose of the framers of the Amendment was to place the citizens and people of the United States forever out of the reach of the despotic or arbitrary action of State legislatures. Whatever a State may do under any power of legislation, call it the police power or by any other name, it cannot abridge the privileges and immunities of citizens of the United States, or arbitrarily interfere with the individual liberty or property of the people of the States, or any essential *incident* to the enjoyment thereof.

The late Dr. Francis Wharton, in his *Commentaries on American Law*, has shown how the great Amendment was essential to perfect our political system, and that it is founded upon the doctrine that the sovereignty of the States is placed, not in their *legislatures*, but in the *people*. That eminent jurist, referring to the traditionary American distrust of legislation, observes:

"It is not strange that this distrust of legislation should find expression in numerous restrictions in the Constitution on the powers both of States and of General Government, and that ultimately it should be provided by an amendment that all powers not expressly given to the General Government should remain in the States or in the people thereof. This was not a *doctrinaire* speculation. It was not a fiction of statesmen desirous of establishing a balance of power. It was the voice of necessity and of right. It was what was

exacted by the traditions of the past, the conditions of the present, and the conscience of both. The final expression of this distrust of legislation is to be found in the Fourteenth Amendment by which the power of State legislatures is so far curtailed as to preclude them from passing any laws taking private property without due process of law, or making any discrimination as to the enjoyment of civil rights. Even had there been no civil war, and no race, heretofore enslaved, to be liberated, this provision would have been *essential to perfect our political system* so as to establish the principle that there shall be no interference by legislation, either State or Federal, with either private property or equality of personal rights. * * *

"By the first group of amendments, embracing the first eleven, the people of the States, as well as the States themselves, are protected from undue aggressions of the Federal Government. *But this was not enough.* It became evident that the people of the States were in danger at least as much from the aggressions of their own legislatures as from the usurpations of Congress. No one can study the statute books of our States without seeing to how vast and pernicious an extent the private rights of individuals have been interfered with by State legislation; and no one who observes the way in which State legislatures are chosen, the materials of which they are often composed, and the temptations to which they are generally subjected, can avoid feeling that they are not fit depositaries of the absolute power claimed for such bodies, and that they should at least be placed under checks as stringent as those placed on Congress by the first group of amendments. * * *

"This clause, as has been already observed, cures what was previously the great defect of our system. It destroys the power which had been assumed by the State legislatures of interfering with private business, and of doing by law that which can far better be done by individual enterprise. And it goes as far as a constitutional limitation can go in establishing the principle, heretofore noticed as one of the first rules of liberal civilization, that government should not exercise functions which can be as well exercised by the people by themselves; that which industry and enterprise can fairly win, arbitrary legislation is not to be permitted to take away. The State rights school of expositors erred in holding that State sovereignty is vested, not in the people of the States,

while remaining in the Union, but in the legislative representatives of the States assembled in constitutional conventions, or in legislatures under the limitation of the State constitutions. The error was great and its consequences have been serious. It led to the assumption (1) that constitutional conventions are absolute, and (2) that State legislatures are absolute, subject only to the limitations of the State constitutions. Nor has this error, on its municipal side, been confined to those who claimed the right of secession. Courts which have been most strenuous in rejecting that claim have been equally strenuous in holding that within the orbit of State power, State legislatures, unless restrained by State constitutional limitations, are absolute. * * * The sovereignty of the States is not in any way impaired by this amendment. But this sovereignty is placed, not in the *legislature*, but in the *people*. The people are hereby protected from the encroachments, not of the Federal Government, but of their legislatures. These legislatures cannot now deprive any persons of their rights without due process of law. There can be no unfair discrimination between persons." (Wharton, Commentaries on American Law, §§ 365, 594, 595.)

As finely observed by Mr. Lawrence Lowell in his essay on the *Limits of Sovereignty:* "The doctrine that sovereign power is unlimited, in the first place, leads almost unavoidably to the opinion that it is proper to use that power without restraint, because the great mass of the people cannot distinguish between the legal and the moral aspects of politics, and are very apt to conclude that if the State has a legal right to do a certain act, it is under no moral obligation to refrain from doing it. There is a danger, in the second place, that the people will confound sovereignty with legislative power, and attribute the former to any body which possesses the latter. If they are taught that the power of the sovereign is absolute, they are likely to believe that the legislature ought to, and, in fact, does, have

authority to pass laws without restraint,—a notion which would undermine the very foundations of our whole political system." (A. Lawrence Lowell, Essays on Government, pp. 192, 193.)

2. The legislation in the Massachusetts insurance act, so far as we are here concerned with it, is an apt illustration of the political phenomena out of which the Fourteenth Amendment in part grew, as referred to by Dr. Wharton. It proceeds upon the idea that the power of the legislature is absolute and unlimited over people and property in the State in respect to the subject of insurance—a theory repugnant to the Amendment, which is founded on the doctrine of the natural rights of man. The object of that penal legislation being not merely to prevent the London Lloyds from doing business as insurers in the limits of the State, but to prevent business intercourse for insurance purposes between the people of the Commonwealth and the British underwriters, the enactment as framed is *ultra vires* the legislature of Massachusetts, and no man's liberty, in the case of such a contract of insurance as that in question here, can be lawfully taken away from him under it.

The penalties of the act purport to be directed against what it calls "*unlawful insurance*," including in that designation contracts made and performable outside of the State with foreign insurance companies not admitted to do business in the State,—contracts over which the State possesses no jurisdiction or power under the Constitution of the United States, and cannot legally prevent or prohibit.

The act, in fact, does not purport to be an exercise of the police power of the legislature to prohibit foreign insurance

companies from doing business within the limits of the Commonwealth.

3. Granted that the legislature possesses the power to prescribe the conditions upon which alone the natural persons who underwrite marine policies at Lloyd's shall exist to do business in the State, and to prohibit the people of the Commonwealth from contracting with them in the territory and jurisdiction of the State, the legislature cannot make it a crime for any person to act as the agent or servant of a citizen of the United States in respect to a contract of insurance with those underwriters which is not effected with them in the limits of the State, but which is effected wholly and entirely by the assured, or through his agents, in England. Criminal legislation, designed to prevent the making of such a foreign contract with those individual underwriters, cannot be deemed an appropriate means of carrying into effect any lawful power of the legislature, under the Federal Constitution, over the transactions of the people of the State with them, but, on the contrary, is outside and beyond the scope of any such power, and is purely arbitrary legislation under the Fourteenth Amendment. Under the judgment below, the plaintiff in error is simply the victim of penal legislation which transcends in its plan and purpose the limits of the legislative power of the State under the great Amendment.

4. The acts performed by the plaintiff in error, as the agent of Johnson & Higgins of New York, and Mr. McKie, within the territorial jurisdiction of the State, related solely to insurance desired and intended to be pro-

cured by McKie out of the territory and jurisdiction of the State, and to the insurance obtained by him which was lawfully effected in England and not in the Commonwealth of Massachusetts. It was not in the power of the jurisdiction of the legislature to punish the acts of the plaintiff in error as a crime against the Commonwealth, and the enactment as enforced against him affords no justification, as we submit, for the judgment rendered in this case.

FIFTH.

The legislative mandate in section 3 of the Massachusetts Act that "all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein," as applied in this criminal case to the English contract which was the basis of the prosecution and conviction of Mr. Nutting, is void as repugnant to the Constitution of the United States.

1. The fifth and sixth requests of the plaintiff in error for rulings by the Superior Court were to the effect that he could not be held criminally liable for an act done without the State, and that so much of section 3 of the act of 1894 as provides that all contracts of insurance on property, lives or interests in the Commonwealth of Massachusetts shall be deemed to be made therein, and as attempts to make a contract entered into without the Commonwealth an act done within it, is repugnant to the Constitution of the United States and void (Defendant's Request for Rulings, *supra;* Record, p. 7).

It is maintained that the trial court should have made the rulings as requested, and that the exceptions of the plaintiff in error should have been sustained and allowed by the Supreme Judicial Court of the State.

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2. It was contended, on the part of the Commonwealth, in support of the decision of the trial court, that the provision in section 3 of the act of 1894 referred to, was intended to establish a rule of evidence for the enforcement of the object of the statute, and to prevent evasion of its provisions by the people of the State, and that as such the enactment was within the constitutional power of the legislature, but it would seem to have been forgotten that this court had conclusively adjudged that the citizens of the State as free men have the inviolable constitutional right to contract with whom they please outside of the State for the insurance of their commercial property in the State, and that the legislature cannot lawfully interfere with their exercise of that right. The legislature cannot, therefore, by a so-called rule of evidence or otherwise assume to prevent a citizen or any free man from evading, if he be so minded, any provision of this legislation designed to limit or interfere with his contractual liberty under the Constitution. There is no evasion, however, of such legislation by a citizen who exercises that liberty. The Constitution simply removes it as an unlawful obstruction in his path. So that if the object of the provision in the 3d section of the act of 1894 referred to, was to prevent the free people of the Commonwealth from exercising their contractual liberty in respect to the insurance of their property in the State, such object was an unconstitutional one, and the enactment was beyond the competent power of the legislature.

3. The enactment is, of course, not embraced by the authority of the legislature to provide rules of evidence in civil cases; nor is it supported by the numerous decisions of the

State courts on the subject of the legislative control over evidence, in that class of cases, cited in the argument below.

Judge Cooley, in his *Constitutional Limitations*, after examining the class of cases relied on by the Commonwealth, says: "But there are fixed bounds to the power of the legislature over this subject (of evidence) which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in *civil cases*, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under the pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations, the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs. * * * A statute, therefore, which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property" (Constitutional Limitations, 6th ed., pp. 452, 453).

Nor is the constitutionality of this enactment sustained by the ground upon which it has been held in several States that in criminal prosecutions the legislature may with some limitations enact that when certain facts have been proved they shall be *prima facie* evidence of the main fact in ques-

tion. As said by Mr. Justice Peckham for the Court of Appeals of New York in *People vs. Cannon* (139 N. Y., 43), "the limitations are that the fact upon which the presumption is to rest must have some fair relation to or natural connection with the main fact." But with regard even to such legislation it was said, and undoubtedly with great force, by Mr. Justice Thomas, dissenting in the case of *Commonwealth vs. Williams* (6 Gray, 11), that "if not strictly an exercise by the legislature of judicial power, within the prohibition of article 30 of the Declaration of Rights, it is the assertion of a power which, carried into full exercise, would take from one department of the judicial tribunal, the jury, its substantial, effective power."

4. The provision of the third section of the Massachusetts act, under consideration, in its application to this criminal action, is undoubtedly in effect nothing but a legislative decree directing the judicial courts of the State to conclusively "deem" the lawful English contract of insurance upon Mr. McKie's vessel in Boston an unlawful Massachusetts contract, contrary to the truth of the transaction under the law of the land, and upon that ground to convict the plaintiff in error of a crime against the State. No such legislative act can stand the test of constitutional argument. This enactment is purely arbitrary legislation, in violation of the provisions of the Fourteenth Amendment in its application to the present case and the rights of the plaintiff in error.

The learned court below would seem to suggest that possibly the intended effect of this enactment, in connection with other provisions of the act of 1894, is to constitute the plaintiff in error the agent of the British underwriters in the

State, and to deprive the contract of insurance in question of its actual British status and character, and in that way to subject the contract to the penal laws of the State for the purpose of punishing Mr. Nutting for negotiating it within the State. And, possibly, that may have been the intended scheme or effect of the provisions of the act referred to, but we are unable to understand how in that view the act can be supposed to be a constitutional exercise of the power of the legislature under the Fourteenth Amendment.

The legislature could not decide for the courts of the State that Mr. Nutting was the agent of the foreign underwriters in the State when, under the *law of the land*, he was *not* their agent, or that the contract of insurance in question was completed in the State when, under the *law of the land*, it was completed in England, or that the insurance was negotiated and transacted in Boston when, under the *law of the land*, it was made and consummated in Liverpool. The enactment as here applied is a plain usurpation of power, and of judicial power, by the legislature in violation of the rights secured to Mr. Nutting by the Fourteenth Amendment. It is an attempt to confiscate the liberty of the citizen by a legislative mandate in violation as well, we should suppose, of the constitution of Massachusetts, by which in the Government of the Commonwealth the legislative department can never exercise the judicial powers, "*to the end that it may be a government of laws and not of men*," as of the Fourteenth Amendment, which disables a State from depriving any person of his liberty without due process of law, or denying to any person within its jurisdiction the equal protection of the laws. The fundamental principle of our system of constitu-

tional government which ordains the separation of the legislative and judicial powers of the State was intended to be safeguarded for the protection of liberty and property by the great Amendment. The Amendment may be said to affirm the celebrated declaration of Mr. Webster in the *Dartmouth College case* (4 Wheaton, 518), when he said as to the power of the legislature:

"It shall not judge, by *act*. It shall not decide, by *act*. It shall not deprive, by *act*. But it shall leave all these things to be tried and adjudged by *the law of the land*. * * * Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. * * * Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country."

In *Smyth vs. Ames* (169 U. S., 466, 527), Mr. Justice Harlan declared:

"The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that which it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to *see to it* that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given to the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

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5. The decision of this court in *Orient Insurance Company vs. Daggs* (172 U. S., 557), referred to in the argument below, in this connection, has no bearing upon the question of the constitutionality of the legislative mandate in the third section of the Massachusetts act as applied in this case. That case involved simply the validity of the "valued policy law" of Missouri as applied to policies of insurance made in that State by foreign corporations doing business in the State under the laws of the State, and this court, in a luminous opinion delivered by Mr. Justice McKenna, decided that *what a State may do with corporations of its own creation it may do with foreign corporations admitted into it*, a proposition which manifestly does not bear upon the question considered above under the third section of the Massachusetts statute.

6. The Commonwealth, in attempting to punish the plaintiff in error, assumed to punish him in respect of acts done beyond the territory and jurisdiction of the State, which by the application of the fiction enacted in the third section of the act of 1894, were imputed to him as done within the territorial jurisdiction of the State, in violation of the fundamental principles of American constitutional law (Cummings *vs.* Missouri, 3 Wall., 277, 319, 320, 325). The Constitution deals with substance, not shadows. The rights of the citizen are secured against deprivation by a mere legislative enactment, under any form, however disguised.

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SIXTH.

The conviction of Mr. Nutting as based upon acts done without the jurisdiction of the Commonwealth in respect to this foreign insurance was illegal, as repugnant to the Constitution of the United States and particularly its Fourteenth Amendment.

The provisions of the act of 1894, especially sections 2, 87, and 89, referred to above, do not, as is manifest, confine their prohibitions to acts done within the Commonwealth. The statute, as has been seen, proceeds upon the view that the legislature has the right to prohibit the citizens of the State under penalties from insuring their property by contracts made with foreign companies not authorized to do business in the State wherever such contracts are made, with the right to declare it an offense for any person to do any act in aid of such alleged unlawful insurance by a citizen of the State; so that if McKie had gone to New York and employed Johnson & Higgins to secure insurance on his vessel in a New York company, and they had done so, Johnson & Higgins would have been subject to prosecution under the act. The insurance contract, by section 3, would have been deemed to have been made in Massachusetts, not only as against McKie, but also as against Johnson & Higgins, and all of them would have been liable to the penalties of the statute.

The difference between this statute and the California act involved in the *Hooper case*, is brought out by the point raised in that case by the defendant "that the statute is by its terms invalid, in that it undertakes to forbid the procurement of a contract outside of the State." Upon that point

the court, speaking by Mr. Justice White, said at page *656*: "It is claimed, however, that, irrespective of this clause, the conviction here is illegal, first, because the statute is by its terms invalid, in that it undertakes to forbid the procurement of a contract outside of the State; and secondly, because the evidence shows that the contract was in fact entered into without the territory of California. The language of the statute is not fairly open to this construction. It punishes every person who *in this State* procures or agrees to procure for a resident of this State any insurance," &c. The words, 'who in this State,' cannot be read out of the law in order to nullify it under the Constitution." The case holds, by necessary implication, that if the California statute had not contained the words, "in this State," it would have been unconstitutional, and the statute is quoted by Mr. Justice Peckham, in the *Allgeyer case*, as bearing this construction. The words, "in this State," are not found in the Massachusetts act, which, as we have said, makes the procurement of insurance by any person for another in a company not authorized to do business in that State, *anywhere and everywhere*, a criminal offense.

2. The negotiation and completion of the English contract of insurance upon which this prosecution was founded, were lawful acts wholly without the jurisdiction of the Commonwealth, and it was not within the legislative power of the State to prohibit and punish them, by whomsoever performed, under the Fourteenth Amendment. The conviction, as based upon those acts, is necessarily illegal under the Federal Constitution.

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SEVENTH.

The provisions of the Massachusetts Insurance Act of 1894, under which, as construed and applied in this case, the conviction of Mr. Nutting, the plaintiff in error, was affirmed by the Supreme Judicial Court of Massachusetts, are in violation of the Fourteenth Amendment of the Constitution of the United States, by depriving the plaintiff in error of his liberty and property without due process of law, and by depriving him of the equal protection of the laws.

1. The conviction of Mr. Nutting was affirmed by the Supreme Judicial Court of Massachusetts apparently mainly under the provisions of sections 3 and 98 of the act of 1894, which, as interpreted by the court, constituted the acts done by him in Massachusetts, as set forth in the agreed statement of facts, *the negotiation and transaction by him in the State of the alleged "unlawful insurance" under the Lloyd's policy obtained by Mr. McKie in London through Tyson and Company of Liverpool.*

By section 3, it is "unlawful" for any company to make any contract of insurance (1) upon any property in the State, or (2) with any resident thereof, except as authorized by the act, or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance (*i. e.*, insurance on any property in the State, or with any resident thereof), except as authorized by the act; and by the same *section 3*, a contract of insurance on any property in the State must be "*deemed to be made therein.*" By *section 98*, it is made a crime for any "*person*" to act in any manner in the negotiation or transaction of "unlawful insurance" with a foreign insurance

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company not admitted to do business in the State, or as "principal or agent" to violate any provision of the act "in regard to the negotiation or effecting of contracts of insurance."

The plaintiff in error was indicted, under *section 98*, as a *person* who negotiated and transacted the alleged "unlawful insurance" in the State.

In respect to the description of the English contract of Mr. McKie in the indictment as "unlawful insurance," the court below said, in view of the decision in *Allgeyer vs. Louisiana*, that whether it be rejected as surplusage or the insurance be held to be "unlawful" because transacted through a broker acting unlawfully, Mr. Nutting was properly convicted under the statute, as construed, of the crime charged in the indictment, and the court overruled the *seventh*, *eighth* and *eleventh* exceptions to the refusals of the trial court to rule as requested, that so much of the provisions of the act of 1894 as purports to make illegal such acts as were done by the plaintiff in error in this case, is void as in conflict with the Constitution of the United States, and particularly its Fourteenth Amendment.

The court below appears to have interpreted and given effect to this whole penal statute, as, *first*, making the English contract "unlawful insurance" under the law of Massachusetts, because of the particular acts done by Mr. Nutting, who happened to be at the time by vocation or calling an insurance broker, and as, *then*, constituting those acts, as set forth in the agreed facts, the negotiation by him of that "unlawful insurance" in the State, in violation of section 98 of the act.

The judicial theory would seem to be that notwithstand-

ing Mr. Nutting had in fact nothing to do with the negotiation of McKie's insurance in London, and it was negotiated by Tyson and Company of Liverpool, as the agents solely of McKie, and not as the agents of the British underwriters, and the contract was wholly an English contract, nevertheless the acts performed by the plaintiff in error, were under the statute the negotiation by him of "unlawful insurance" in Massachusetts.

2. The conviction of Mr. Nutting is sustained by the Supreme Judicial Court of Massachusetts specifically upon the ground that Mr. McKie's insurance, although a lawful and valid English contract, made and completed in England, was unlawful insurance under the act of 1894, and Mr. Nutting was criminally liable in respect to it.

The decision in *Allgeyer vs. Louisiana* deprived this insurance of the character of *unlawful* insurance imputed to it by the statute, and it was not in the power of the legislative or judicial authorities of the State to treat the insurance and deal with it as unlawful insurance for the purpose of punishing Mr. Nutting for his acts in respect to the transaction. The insurance in question being perfectly "lawful insurance" under the supreme law of the land, as expounded by this court, the State had no power to declare and make it "unlawful insurance" for the purpose of subjecting the plaintiff in error to criminal liability in respect to it.

3. Now, the only acts done by Mr. Nutting within the territory and jurisdiction of Massachusetts were in effect these: (1) to seek employment by Mr. McKie as his servant or agent to procure insurance upon his vessel, (2) to secure, as

agent for Johnson & Higgins of New York, the authority of McKie to the placing of a contract of insurance upon the vessel, and to transmit an order for such insurance to Johnson & Higgins of New York, (3) a contract for such insurance having been negotiated and consummated by and the policy therefor delivered to and the premiums thereon paid by Tyson and Company of Liverpool, in the territory and jurisdiction of Great Britain (they acting in the premises as the servants or agents only of McKie, and not as the agents of the underwriters at Lloyd's who subscribed the policy), and such policy having come into his possession at Boston, not as the agent of the British underwriters, but as the servant or agent of McKie, to mail the policy to McKie at Boston as the lawful owner thereof.

The court below in holding that by these particular acts the plaintiff in error was legally guilty of the crime charged in this indictment, necessarily decided that under *section 3* of the act of 1894, relied on by the prosecution for conviction, the English contract of insurance was to be "deemed" to be made in the Commonwealth, or that the plaintiff in error was to be "*regarded*" as the agent of the British underwriters in Massachusetts, and in that way the English contract was to be treated as made in the State, and thus subject to its legislation for the purpose of affecting the plaintiff in error personally with criminal liability as for the negotiation of the contract in the Commonwealth. In no other way and upon no other theory was it possible, as we suppose, for the court to conclude and decide that this perfectly lawful English contract, negotiated and completed in London, was "unlawful" insurance under and subject to the law of the

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State, and that the acts of the plaintiff in error were the negotiation of such insurance by him in the Commonwealth.

4. There can be no question we apprehend that the enactment, as thus construed and given effect by the court below against Mr. Nutting, is void as repugnant to the fundamental law of the land. It deprived him of his liberty if not his property without due process of law. It was constitutionally impossible for the legislature, *for the purpose and with the effect of constituting Mr. Nutting's acts a public crime as the negotiation or transaction by him of "unlawful insurance" in the State*, to lawfully enact that a contract of insurance made in England was not made there, but was made in Massachusetts, or that Mr. Nutting, who was solely the agent and servant of Mr. McKie, in Boston, was the authorized agent there of the British underwriters. Mr. Nutting's liberty is unlawfully taken away from him through the enforcement against him by the court of legal fictions decreed by the legislature for the purpose of effecting the identical result accomplished in this case, and, of course, without due process of law. The enactment, as construed, applied, and enforced in this case, is not legislation in the constitutional sense, and nothing but a legislative mandate or decree, without validity as against any citizen of the State under the Constitution of the United States. "*Such power assimilates itself more closely to despotic rule than any other attribute of government.*" (Cooley, Constitutional Limitations, 109, Cummings *vs.* Missouri, 4 Wallace, 277, 325.)

5. The plaintiff in error further maintains that it was not in the lawful power of the legislature to make it a penal

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offense for him to perform the acts done by him in his capacity as the agent of Johnson & Higgins of New York, and Mr. McKie, in the State, with reference to the foreign insurance desired to be obtained and procured by McKie, through Johnson & Higgins of New York, although his calling or vocation at the time was that of an insurance broker, and that the statute enforced against him by the courts of the Commonwealth is an illegal interference with his common-law and constitutional rights of liberty and property, as well as an unlawful abridgment of the constitutional privileges of Johnson & Higgins, his principals in New York, through whom this lawful policy of insurance was procured in Great Britain.

Under the agreed facts, in the case, what was done by Mr. Nutting was performed by him solely as the agent of his employers, and his acts in that capacity were such acts and such acts only as might have been done by any other person in the community employed by his principals in the premises.

6. The act of 1894, as enforced against the plaintiff in error, denies to him and deprives him of the equal protection of the laws which the Fourteenth Amendment was designed to secure to him in the State of Massachusetts.

The statute, as construed and applied in this case, is a plain violation of the principle of right and justice embodied in the Amendment that "*the equal protection of the laws is a pledge of the protection of equal laws*" (Yick Wo *vs.* Hopkins, 118 U. S., 356, 369; Gulf, &c., Railway Co. *vs.* Ellis, 165 U. S., 150, 159).

As Mr. Arnould states, an "*insurance broker*" is one who

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acts as "*a middleman*" between the assured and the insurance company in the transaction of insurance (1 Arnould, Insurance, 2d ed., p. 108), and the definition is approved in *Arff vs. S. F. Insurance Co.* (125 N. Y., 57). It is certain that Mr. Nutting never acted in the character and capacity of a *middleman* or "insurance broker," between McKie and the British underwriters of the policy of insurance in question, and that his acts which are the subject of complaint by the Commonwealth, were done as the mere agent, servant or employé of Johnson & Higgins, and McKie, for the particular purposes intended by his employment, and that the same things might have been done, as we have said, as well by any other person employed for the same purposes by his principals. The legislation as interpreted constitutes the particular acts of the plaintiff in error a criminal offence, not as those of a middleman or "insurance broker," acting as such, between the assured and the underwriters, in respect of the insurance here complained of, but as the acts of a "person" whose calling or occupation at the time happened to be that of an "insurance broker." The plaintiff in error is thus deprived by the statute of a common-law right and privilege accorded to all other "persons" in the community, and denied in that regard the equal protection of the laws of the State.

The legislature of a State has no power to arbitrarily select one individual or class of individuals, and visit a penalty upon him or them which is not imposed upon others guilty of like delinquencies.

It has been impressively said by Mr. Justice Brewer: "No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speak-

ing for this court, in *Yick Wo vs. Hopkins* (118 U. S., 356, 369): '*When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.*' * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government" (Gulf, etc., Railway Co. *vs.* Ellis, 165 U. S., 159, 160).

EIGHTH.

The acts done by Mr. Nutting, as stated in the agreed facts, are acts which the Legislature of Massachusetts had no power to condemn and punish as a criminal offense against the Commonwealth under the Fourteenth Amendment of the Constitution of the United States.

1. If the plaintiff in error had not the lawful right to do the acts upon which his conviction as for a public crime was based in this case, it is hard to see how he can be regarded as a free man and a free citizen of a free country, and it is equally difficult to perceive how that character can be attributed to the American ship-owner and assured in Boston for whom he acted. The rights and liberties of Mr. McKie, as well as those of Mr. Nutting, it will be perceived, are involved in the present controversy.

In *Schollenberger vs. Pennsylvania* (171 U. S., 1, 24) this court, speaking by Mr. Justice Peckham, said: "The importer had the right to sell not only *personally*, but he had the right to employ an *agent* to sell for him. Otherwise his

right to sell would be substantially valueless, for it cannot be supposed that he would be personally engaged in the sale of every original package sent to the different States in the Union. Having the right to sell through his agent, a sale thus effected is valid." In the *Schollenberger* case, the prosecution under the State law was against the authorized agent of the manufacturer and importer, but the agent was protected against the attempted exertion of the so-called police power of the State by the shield of the constitutional rights of his principal. The principle is the same here. Mr. McKie having the constitutional right to effect this insurance with the underwriters at Lloyd's, there can be no punishment inflicted by the State upon the plaintiff in error for doing what he did as the agent or servant of McKie in respect to the insurance.

2. There can be no valid legislation by a State under its police power, or otherwise, which encroaches upon individual rights granted, secured or protected by the Federal Constitution. As said by Mr. Justice Harlan in *New Orleans Gas Company vs. Louisiana Light Company* (115 U. S., 654, 661), "definitions of the police power must be taken subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the General Government, or *rights granted or secured by the supreme law of the land.*" The same principle was declared by Mr. Justice Strong in *Railroad Company vs. Husen* (95 U. S., 465), when he said that under the color of the police power "*objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution.*"

There can be no doubt, as we have said, that the object of

this penal legislation, as interpreted by the courts below, and enforced against the plaintiff in error in this case, was to prevent Mr. McKie and the other citizens and people of the State from exercising their right to protect their property in the State by contracts of insurance made and to be performed in another State or foreign country with companies not authorized to do business in the Commonwealth. The legislation is thus a direct encroachment upon a constitutional right of the citizens and people of the State, as recognized by this court, and it can have no validity against any person to whom it may be sought to be applied by the authorities of the Commonwealth in respect to such a contract as that involved in this case.

3. Under the decision and doctrine in *Allgeyer vs. Louisiana*, as must be conceded, a State legislature, since the Fourteenth Amendment, possesses no arbitrary power of criminal legislation over acts performed by a citizen within the State under or with respect to a contract of insurance made or desired to be made by him outside of the State with a foreign corporation even not authorized to do business in the State, much less natural persons like the London Lloyds.

The legislature of Louisiana had assumed by its insurance act arbitrary power "to prevent persons from *dealing with* marine insurance companies that have not complied with law," and to make it a crime "to effect insurance on property, then in this State, in any marine insurance company which had not complied in all respects with the laws of this State." The public policy of that State was declared by the statute to be that no citizen *while in the State* should make a contract with any foreign corporation not authorized to do business in the State, wherever the contract was made, or do

any act in the State to effectuate such a contract. The supreme court of the State had declared this to be the public policy of the State, and affirmed its validity. It has said, "*the sovereignty of the State would be a mockery if it had not the power to compel its citizens to respect its laws.* Individual liberty of action must give way to the greater right of the *collective people* in the assertion of a well-defined policy, designed and intended for the general welfare. The act of insurance was done *within the State and the offense denounced by the statute was complete.*"

Such doctrine may have been well enough before the Fourteenth Amendment, when it was often supposed that the legislature for the most part was a sovereign with unlimited powers; but this court in effect said by its judgment in the *Allgeyer case* that since the Amendment the sovereignty of the people would be a "mockery" if their creature, the legislature, could enact such a law as that, and that individual liberty in respect to the subject of insurance is not under the unrestrained power of the legislature. This court would not accept the idea that the legislature could set up and enforce an alleged "*public policy*" upon this subject which was hostile to the rights of individual liberty and property belonging to the citizen as a member of a free Republic.

The effective act of insurance, in that case, *was* done within the State in violation of the statute. The open policy made in New York was substantially an executory contract, which did not and could not attach to the property desired to be insured, before and until the act complained of and sought to be punished by the prosecution was done by the assured within the State in violation of the statute. But this court decided that the legislature had no power, under its police

authority, or otherwise, to prohibit and prevent the doing of such an act by the citizen within the State, because it was necessary, appropriate or useful to enable him to execute the contract made out of the State for the insurance of his property in its limits. To concede to the citizen the authority and right to obtain the open policy in New York, but to allow the legislature to forbid him from doing in the State the act complained of by the prosecution, would be tantamount to allowing the State to prohibit him from entering into such a contract at all in New York. The court, in other words, decided, in the *Allgeyer case*, as we suppose, that the right of the citizen to insure his property by a contract made and to be performed out of the State, included, as an essential incident to the enjoyment thereof, the right to do and perform within the State acts necessary, appropriate, or useful to the execution of the contract, and, therefore, that such acts are not subject to the territorial police power of the State for the purpose of preventing them by criminal punishment or otherwise. Such acts the citizen is guaranteed the right to perform within the State by the Fourteenth Amendment of the Constitution, the so-called police power of the State to the contrary notwithstanding.

By means of the act performed within the State of Louisiana by the defendant in the *Allgeyer case*, a special contract of insurance was effected under his open policy upon his cotton in the State, but that contract was a New York contract, as held, and this court adjudged that the act done by the defendant within the State by means of which that special contract of insurance was effected by him,

could not lawfully be made a penal offense by the State legislature.

4. It is submitted, on the part of the plaintiff in error, that the legislature of Massachusetts possessed no more authority, under its so-called police power, to prohibit him by penal enactment from doing within the State, on behalf of his principals, the particular acts here complained of as a criminal offense, than had the legislature of Louisiana to make it a crime, by its police power, for Mr. Allgeyer to perform within that State the particular act which was the subject of complaint in the prosecution against him, and by which he effected the special contract of insurance, under the open policy, on his property in the State.

It would seem impossible to successfully maintain, under the juridical principles recognized by this court in *Allgeyer vs. Louisiana*, that Mr. Nutting's acts, in his capacity as the agent of Johnson & Higgins, and McKie, were such acts as the legislature had the right, under its police power, to make a criminal offense against the State, at least in reference to the Federal Constitution.

5. Practically, the only substantive and effective act performed by the plaintiff in error was the transmission, no doubt, by mail, from Boston to New York, of the order or authority given by McKie to Johnson & Higgins of New York to procure for him the insurance he wished to obtain on his new vessel. Everything else was mere talk.

It is not within the competent authority of the legislature to condemn and punish this act of Mr. Nutting as a crime against the Commonwealth unless it possesses absolute and

arbitrary power to prohibit and prevent any and all acts performed in the State having reference to insurance on property in its limits desired to be procured and procured by a citizen under a contract made and to be performed in another State or another country. Such power no State legislature possesses under the Constitution of the United States.

6. Let it be supposed that Mr. Nutting had gone to New York by request of Mr. McKie, and carried with him an order for Johnson & Higgins, his principals, to place outside of Massachusetts the insurance McKie wanted upon his new vessel, can it be maintained that such acts on the part of Mr. Nutting could be lawfully made a punishable crime by the legislature in the exercise of its so-called police power? Plainly the right of McKie to apply directly to Johnson & Higgins with respect to his desired foreign insurance included and carried with it the right to ask and employ their agent in Boston to transmit to them by mail or otherwise an order or authority to obtain such insurance, and the act of the agent under such employment cannot be made by the State a public crime.

7. The theory that the legislature may lawfully declare Mr. Nutting to be the agent or an agent of the British underwriters in Massachusetts and deal with his acts as such, cannot be entertained for a moment under the Fourteenth Amendment. It is equally impossible to maintain, as we suppose, that the legislature may strip the plaintiff in error bare of all legal right to become and act in the capacity of an agent of Johnson & Higgins, who are engaged in a lawful calling in New York, and of all

such right to have communication and intercourse with a Boston ship-owner about insurance on his property to be effected outside of the Commonwealth by or through Johnson & Higgins of New York, and of all legal right to secure for his principals the ship-owner's employment and authority to procure insurance on his vessel in another State or a foreign country, and transmit to his principals by mail or otherwise the requisite order to them to obtain such insurance for the ship-owner, and that the legislature can do this by making such acts on his part a public crime.

The claim asserted on the part of the legislature is one of discretionary and arbitrary authority and power to so deal with the right and freedom of contract and other natural rights and capacities of the plaintiff in error, as to render it unlawful for him to make an *agreement* with Johnson & Higgins to become and act as their agent in the Commonwealth, and disqualify and disable him from doing anything under his agreement with them in his character as their agent in Massachusetts, with reference to marine insurance desired and proposed to be obtained by a citizen of the State, through Johnson & Higgins, outside of the territory of the Commonwealth.

The act in question as applied in this case in fact operates in effect upon the natural rights and privileges and the legal capacities not only of the plaintiff in error, but also of Johnson & Higgins, and assumes to put all of those persons under a sort of outlawry in the State with respect to the subject of foreign insurance upon the property of citizens of the State; and the practical question would seem to be whether such an arbitrary enactment can be sus-

tained as a valid exercise of the police power of the State since the Fourteenth Amendment.

It is respectfully submitted that the legislature cannot arbitrarily interfere in this way, by criminal enactment, with the contractual liberty and freedom, and the natural rights and capacities, of Mr. Nutting, and Johnson & Higgins, for the purpose and to the end and as a means of preventing the citizens of the State from exercising their common-law and constitutional right of foreign insurance in respect to their maritime property in the Commonwealth.

"Liberty" includes the right to contract as others may, and to take away that right from a class of persons following lawful pursuits or callings in the State, is simply to deprive them of a time-honored right which the Constitution undertakes to secure to every citizen.

8. The legislature derived no authority to prevent Mr. Nutting from acting as the agent and attorney of Johnson & Higgins, in the State, under his agreement with them, by punishing such acts as were done by him in this matter, from the fact and character of his general occupation as an insurance broker. His license is not a privilege or franchise conceded by the State according to its will. It gave the legislature no arbitrary power over him and his private contracts or business pursuits. It is within the just and constitutional limits of the legislative power to make reasonable and uniform regulations in respect to callings and business in the State, but there is no warrant for an exercise of legislative power under the pretense and color of regulating a calling or business, which operates to subvert the liberty of pursuit

and the freedom of contract and employment on the part of the citizen. As said by Judge Cooley, "the general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. It is not competent, therefore, to forbid any person or class of persons, whether citizens or aliens, from offering their services in lawful business or to subject others to penalties for employing them" (Constitutional Limitations, p. 745; Baker *vs.* Portland, 5 Sawyer, 566).

Mr. Nutting, in respect of the matter complained of in this prosecution, acted as the lawful agent or employé of his principals in New York, who had a right to his services, and not as a broker or middleman negotiating or effecting insurance in the State, and no insurance was negotiated or effected there by or through him, or any one else, on behalf of Mr. McKie.

It is well known that in most commercial countries there are persons more or less conversant with the subject of marine insurance, who are not or who do not act as "insurance brokers," but who are employed as mercantile agents, as Mr. Lowndes states, "to effect insurance in one country on behalf of the owner in another, or employed as men of business because the owner is out of business, or for some other reason prefers to do his work by deputy" (Lowndes, Marine Insurance, p. 38). This is a useful occupation in a commercial country, and one which in a free country is not and cannot be made the subject of hostile or arbitrary legislation against the citizen.

As said by Mr. Justice Brown in *Lawton vs. Steele* (152 U. S., 133, 137): "The legislature may not, under the guise

of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." And as declared by Mr. Justice Harlan, in *Mugler vs. Kansas* (123 U. S., 625, 661): "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

9. The broad ground upon which this penal legislation, as construed and enforced by the courts below, should be deemed to be, as we submit, in violation of the fundamental law of the country, has been already indicated, and it is that as the insurance upon which Mr. Nutting's conviction was based, is wholly lawful insurance in the contemplation and view of the Constitution of the United States, the legislature cannot treat it as an unlawful transaction as against any person whomsoever in the Commonwealth. State legislation assuming to declare such a lawful contract of insurance as that of Mr. McKie unlawful insurance for the purpose of punishing the plaintiff in error as an insurance broker, or otherwise, for what he did in respect to the transaction, as a criminal offense against the Commonwealth, is necessarily arbitrary legislation, which can have no effect or operation under the supreme law of the land.

The object of this enactment, as directed against the plaintiff in error, was, as we have said, to prevent the making by the citizens and people of the Commonwealth of such foreign contracts of insurance as that of Mr. McKie upon their

property in the State,—contracts which the State legislature has no jurisdiction or power to prevent or prohibit under the Constitution of the United States.

If there is any principle well settled in our jurisprudence it is that even an acknowledged power cannot be exerted for the purpose of effecting indirectly an unconstitutional object which the legislature cannot directly attempt to reach.

It is very clear under the decisions of this court that in any case and every situation where the end is unlawful and repugnant to the supreme law of the land, it is equally unlawful and equally in violation of the Constitution to use any means, however proper, or within the power of the State for lawful purposes, for the attainment of that unlawful end, or the accomplishment of that unlawful purpose. It cannot be otherwise than unlawful for the legislature to use any means whatever to accomplish an unlawful purpose (Brown *vs.* Maryland, 12 Wheaton, 419; Ward *vs.* Maryland, 12 Wall., 431; Woodruff *vs.* Parkham, 8 *id.*, 130–140; Hinson *vs.* Lott, *id.*, 152; Welton *vs.* Missouri, 91 U. S., 279–282; Cook *vs.* Pennsylvania, 97 U. S., 573).

10. It was said by this court in *Bank of Augusta vs. Earle* (13 Peters, 588) that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty." And in *Paul vs. Virginia* (8 Wallace, 181), it was added that "the recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States, a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in

other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose."

Whatever power under this doctrine a State may exert by criminal legislation for the purpose of preventing a foreign insurance corporation from exercising its franchises within the limits of the State, there is certainly nothing in the doctrine that furnishes any support or warrant for penal legislation designed to prevent the citizens of the State (who are also citizens of the United States) from exercising their natural right to insure their property by contracts made in England with the underwriters at Lloyd's, and which constitutes it a crime for a person whose calling is that of an insurance broker to do such acts in reference to such foreign insurance as were performed by the plaintiff in error, as the agent of Mr. McKie, in respect to the English contract upon which this prosecution was founded.

The business involved in the insurance of the maritime property of a citizen of the State by a contract made and completed by the British underwriters in England, and which is also to be performed in England, is not done within the territory of the State, and the State has in fact no jurisdiction over it or in regard to it, and penal legislation directed against the agent of the assured in respect to such foreign insurance, although he is an insurance broker, is and can only be such arbitrary legislation on the part of the State as was intended to be prohibited by the Fourteenth Amendment.

The purpose of the Amendment was to exclude everything

of an arbitrary character in State legislation affecting the rights and liberties of the citizen, and it can be nothing less than an arbitrary interference with such rights and liberties for the legislature to undertake to deal criminally with any citizen for acting as the agent of another in respect to a lawful and valid contract of marine insurance made by his principal with natural persons in a foreign country, and which the State has no lawful power to prevent or prohibit under the Constitution of the United States.

The contract as made and completed in a foreign country is outside of the jurisdiction of the State of the residence of the assured and his agent, and subject to the jurisdiction and laws of another sovereignty. It is not within the legislative authority of the State, therefore, to punish the assured or the agent of the assured in respect of the transaction. The transaction is one, in fact, in which the State has no interest in any just constitutional sense. The State cannot lawfully punish the agent in respect to the making of the contract, as entered into in the foreign country, any more than it can legally punish the assured himself on account of that transaction, and any legislation of the State providing for such punishment, in the case either of the assured or his agent, is such arbitrary legislation as is within the prohibition of the Fourteenth Amendment.

11. It is not maintained in the opinion of the Supreme Judicial Court of the State in this case, as we understand it, that the penal enactment under which the plaintiff in error was convicted of a crime against the Commonwealth, is an intended exercise of the power of the legislature to prohibit the underwriters at Lloyd's from acquiring a domicile or

from doing business by their agents within the State, but the position would seem to be that the enactment is an intended execution of the policy of the legislature against business intercourse for insurance purposes between the people of the State and the British underwriters, and that for such purpose the legislature has the power to provide for the arbitrary punishment of a citizen of the Commonwealth for acting as the agent of the assured in respect to a contract made by those underwriters in England as if he were in fact the agent of the insurers, and as if the contract were in fact made within the limits of the State. Such a view of the legislative power, we submit, finds no support in the principles upon which our system of constitutional and republican government is founded, and which were intended to be safeguarded by the Fourteenth Amendment.

NINTH.

The provisions of the Massachusetts Insurance Act of 1894, involved in this case, as interpreted and enforced by the courts below, are in violation of the rights of Mr. McKie, and the other American ship-owners in the Commonwealth, as well as those of the plaintiff in error, under the Fourteenth Amendment of the Constitution of the United States. As respects Mr. McKie, the legislation is an infringement of each of the prohibitions of the Amendment.

1. The Fourteenth Amendment after declaring that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside, goes on to declare that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

*

nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Under the first clause of the Amendment, Mr. McKie, the American ship-owner and assured in this case, as a citizen of Massachusetts, is a citizen of the United States residing in that State; and the proposition now is that the Massachusetts act, as enforced against the plaintiff in error, according to the interpretation and effect given to it by the courts below, in this case, violates the fundamental rights of Mr. McKie, under the Amendment, and specially operates to abridge his privileges as a citizen of the United States, and for that reason is invalid and void.

2. The Supreme Judicial Court of Massachusetts, while recognizing the right of McKie, if so minded, to apply from Boston to the underwriters at Lloyd's for insurance on his property, affirmed the competent power of the legislature, for the purpose and to accomplish the object intended by it, to make it a crime for Mr. Nutting, the agent of Johnson & Higgins, and of McKie, to do the particular ministerial acts performed by him in the State with respect to the foreign insurance desired and obtained by McKie upon which the prosecution and conviction in this case were based.

The object of the legislature in making it a criminal offense for Mr. Nutting to do the acts performed by him, and in providing for his punishment therefor, avowedly was, as shown, to carry into effect the unconstitutional prohibition of the legislature against such foreign contracts of insurance on the part of citizens of the State, and to restrain and prevent McKie from protecting his property

by insurance with the London Lloyds, although as now acknowledged it was his inviolable constitutional right to insure his property by a contract made with those underwriters in England, anything in the Massachusetts act to the contrary notwithstanding.

3. It is respectfully maintained on the part of the plaintiff in error that Mr. McKie's right to make a contract with the underwriters at Lloyd's for the protection of his property in Massachusetts, included and carried with it as an essential incident to the enjoyment of that right, the right on the part of McKie to employ Johnson & Higgins, and the plaintiff in error, as his agents or servants, for the purposes for which they acted in the transaction involved in this case, and that the legislature had no more power to deprive him of that right by penal legislation directed against his agents or servants in such a matter of proposed foreign insurance, than it possessed to make it a crime for McKie to apply to the British underwriters directly and personally from Boston for the insurance he desired on his property. The principle is the same, as already said, as that applied by this court in the *Schollenberger case* (171 U. S., 1), where the constitutional right of the importer was held to carry with it as an incident the right to employ an agent to execute his constitutional right, and to protect the agent of the importer in doing what he did against the exercise of the so-called police power of the State.

The great general doctrine of the court is that every constitutional right of liberty and property should be liberally construed and enforced. It is not to be made by construction "*a mere barren and abstract right, without any practical opera-*

tion upon the business of life" (Chief Justice Taney in Bronson *vs.* Kinzie, 1 Howard, 318; *Pumpelley vs. Green Bay* Company, 13 Wallace, 166).

Of what avail, it may be asked, would be the constitutional right of an American ship-owner, like McKie, to insure his maritime property where he has a mind to—with the London Lloyds if deemed expedient—if he could be denied by the legislature the services of competent persons, acquainted with the practice of marine insurance, as his agents, for the performance of such ministerial acts as were done in this case by Johnson & Higgins, and Mr. Nutting, in behalf of McKie, with respect to the marine insurance he desired to obtain on his American vessel out of the State of Massachusetts? Practically, the right would be, in the language of Chief Justice Taney, "a mere barren and abstract right, without any practical operation upon the business of life."

It is submitted that Mr. McKie had the right to apply to Johnson & Higgins in New York to obtain such foreign insurance for him, and he had the right to apply to them, through Mr. Nutting, their agent in Boston, for that purpose, and through him to send an order to New York to Johnson & Higgins to obtain the foreign insurance, and to receive the foreign policy as negotiated abroad at the hands of Johnson & Higgins and Mr. Nutting, and the legislature had no power to deprive him of the right to do these things by punitive legislation directed against those ministerial agents, or any of them.

To concede to Mr. McKie the right to make a foreign contract of insurance with the London Lloyds, but to forbid him from employing intelligent persons, acquainted with

the practice of insurance, to do what was done for him ministerially by the persons who acted as his agents in this matter, is tantamount to a prohibition against the making of any such a contract at all in Great Britain.

4. It is submitted that the Massachusetts act as enforced in this case against Mr. Nutting is violative of the fundamental rights of McKie under the Constitution, and as respects him is an infringement of each of the prohibitions of the Fourteenth Amendment. The right of a citizen of the United States to protect his vessel engaged or to be engaged as an American vessel in foreign or domestic commerce under the navigation laws of the United States, by a contract of marine insurance made with foreign underwriters, like the London Lloyds, in a foreign country, may be properly regarded as one of his rights and privileges as a citizen of the United States in respect to such property within the just sense of the Fourteenth Amendment. This court has not conclusively defined the privileges and immunities of a citizen of the United States under the Amendment in a general classification, preferring no doubt to decide each case as it may arise, but it would certainly seem that among the special privileges of a citizen of the United States as such is his right of personal and business intercourse with foreign countries and their subjects or citizens, and of entering into all contracts abroad with those subjects or citizens, including contracts of marine insurance, under the sanction of the territorial law, and that this his right is protected by the Amendment from being abridged in any manner by the action of the State in which he may happen to be domiciled. Judge Cooley, considering the line of distinction between

the privileges and immunities of citizens of the United States and those of citizens of the several States, observes: "Whatever one may claim as of right under the Constitution and laws of the United States by virtue of his citizenship, is a privilege of a citizen of the United States. Whatever the Constitution and laws of the United States entitle him to exemption from, he may claim an immunity in respect to. *Slaughter House cases*, 16 Wall., 36. And such a right or privilege is abridged whenever the State law interferes with any legitimate operation of the Federal authority which concerns his interest, whether it be an authority actively exerted, or resting only in the express or implied command or assurance of the Federal Constitution or laws" (Cooley, Principles of Const. Law, 246; Cooley, Const. Limitations, 6th ed., p. 489).

Massachusetts is one of the greatest Commonwealths in the world, but in Great Britain and in respect to such a foreign contract as that made by this policy of the underwriters at Lloyd's, for the insurance of an American vessel, Mr. McKie is known only as a citizen of the United States, and his rights under the contract are by the Constitution and the public law ultimately under the international protection of the sovereign Government of the United States, and in their character as rights possessed and exercised by him as a citizen of the United States, and not as a citizen of Massachusetts.

5. As this court has said, the power of Congress to regulate international and interstate commerce embraces within its control all the *instrumentalities* by which that commerce may be carried on. "The subjects, therefore, upon which the

power may be exerted are of infinite variety" (Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196). In that case, the court referred approvingly to the statement of Judge Cooley that under the commercial power Congress may descend to the most minute directions if it shall be deemed desirable, and to whatever extent ground shall be covered by those directions, the exercise of State power is excluded (Cooley, Constitutional Limitations, 732). It would seem clear, therefore, that among the subjects over which the commercial power of Congress may be exercised is that of insurance upon American vessels engaged in the navigation and trade of the United States. It has been, moreover, adjudged by this court, affirming the early decision of Mr. Justice Story in *De Lovio vs. Boit* (2 Gallison, 398), that the contract of marine insurance is a maritime contract within the admiralty and maritime jurisdiction of the United States (Insurance Company *vs.* Dunham, 11 Wallace, 1). And by a settled doctrine of international law an American ship on the high seas is a part of the territory of the United States, and subject exclusively to the national jurisdiction, and in a foreign port "brings with and keeps over her to a very considerable extent," as said by Mr. Webster in his celebrated correspondence with Lord Ashburton, "the jurisdiction and authority of the laws of her own country" (6th Webster's Works, 506; Wharton, Conf. of Laws, § 356; Crapo *vs.* Kelly, 16 Wallace, 610).

In view of these principles, we submit, the right of Mr. McKie to insure his American vessel by a contract effected abroad with the London Lloyds, or other foreign underwriters, should be deemed one of his rights and privileges as a citizen of the United States, under the Fourteenth

Amendment, which the Commonwealth of Massachusetts cannot abridge or interfere with by such hostile legislation as that enforced against his agent, the plaintiff in error, in this case.

6. But if the Massachusetts act, as here enforced, does not abridge one of the privileges of this American ship-owner as a citizen of the United States, it certainly does operate to deprive him of a portion of his liberty and property, as understood in our jurisprudence, without due process of law.

The intended effect of the legislation under consideration is to subject him to a species of business servitude in the State of his residence with respect to this important matter of foreign insurance on his maritime property there. Upon the face of the act, it is "unlawful" for him and a crime to insure his ship by a marine policy made in a foreign country with marine underwriters not authorized to do business in the State, and such a contract is imputed to him and everybody as "made in this Commonwealth" for the purposes of the criminal jurisdiction of the State. If the ship-owner employs insurance agents in a foreign country, as Tyson and Company in this case were employed, to obtain for him a foreign policy of insurance on his vessel, a thing that may be absolutely necessary for his purposes in dealing with his property abroad, the insurance thus procured is stigmatized as "unlawful" insurance, and his ministerial agents or servants in the State are subject to prosecution as for a crime in and against the Commonwealth. The legislation thus effectually takes away from him the right to employ persons conversant with insurance to do any ministerial acts in aid or furtherance of his inviolable right of foreign insurance

under the Constitution, and effectually prevents him from exercising that right in a manner conducive to his interests as an American ship-owner. His right is reduced to a mere "barren and abstract one, without any practical operation upon the business of life." It cannot be said that by this legislation the citizen is not deprived to a certain extent of his liberty, and potentially of his property or a portion of it, without due process of law.

7. If the Massachusetts act of 1894 be allowed to have effect with regard to contracts of marine insurance such as that here in question, the American ship-owner in the State is practically debarred intercourse with a certain class of those with whom it is or may be of the highest importance that he should have the right and ability to establish contract relations beyond the territory of Massachusetts, while the community at large is allowed the natural right and privilege of making such contracts with the citizens or subjects of foreign countries as may be necessary or convenient for the use and enjoyment of their property untrammeled by burdensome and restrictive legislation on the part of the Commonwealth. If that is not a denial of the equal protection of the laws, it is hard to see what would come within the constitutional prohibition.

The practical result of the restrictive legislation applied and enforced in this case, if its validity should be affirmed, would undoubtedly seem to be that with reference to the matter involved, Massachusetts and the American ship-owners in the Commonwealth become isolated from the rest of the civilized world.

It is respectfully submitted that the judgment of the Superior Court of the State of Massachusetts should be reversed, and that the case should be remanded with directions to that court to grant a new trial.

J. HUBLEY ASHTON,
Of Counsel for the Plaintiff in Error.